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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 170

GREGG DYEING COMPANY, APPELLANT,

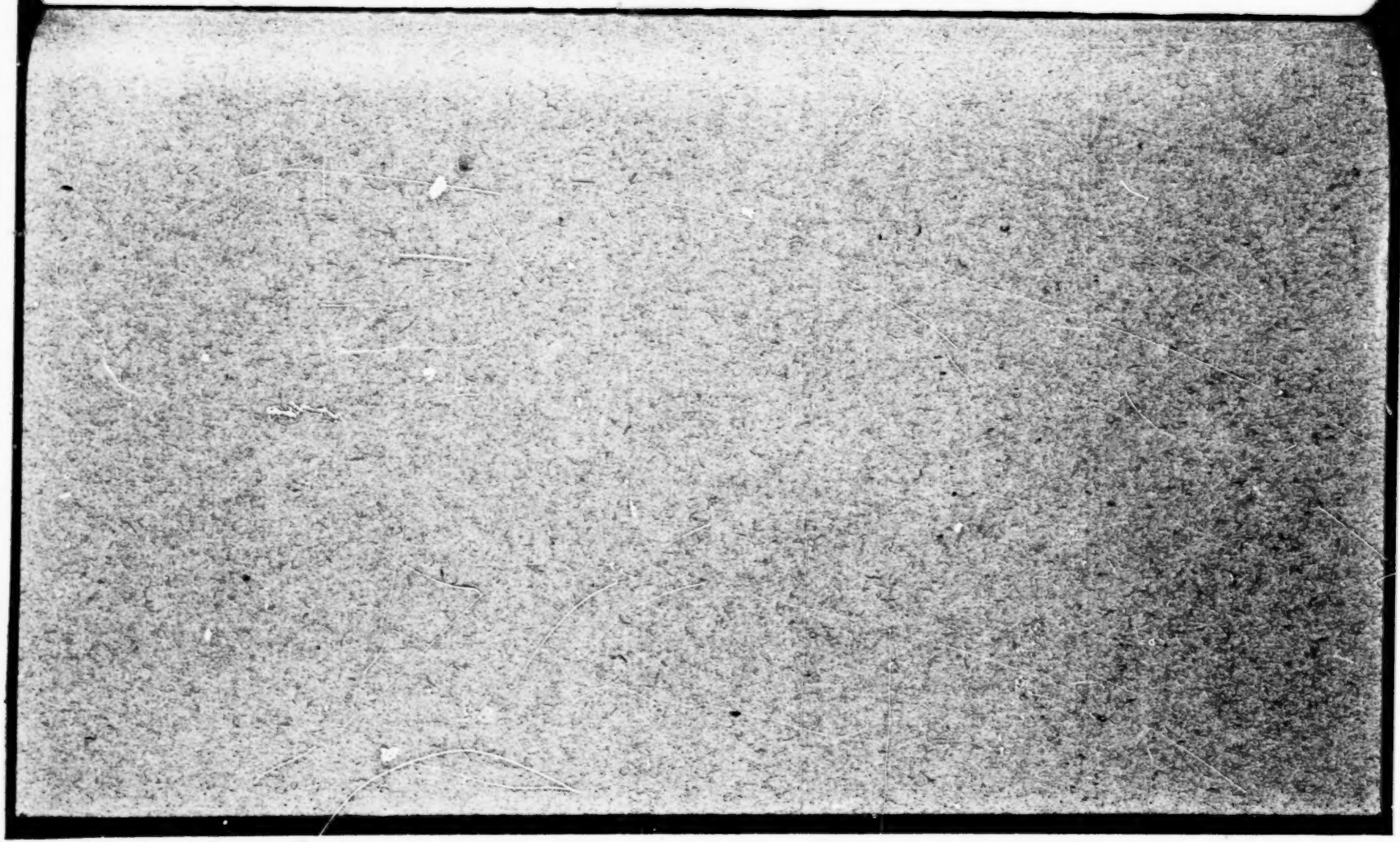
vs.

W. G. QUERY, J. P. DERHAM, AND F. C. ROBINSON, PERSONALLY AND AS MEMBERS OF SOUTH CAROLINA TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

FILED JUNE 20, 1931

(35,984)



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The State of South Carolina
In The Supreme Court

IN THE ORIGINAL JURISDICTION

GREGG DYEING COMPANY, Plaintiff and Petitioner,

against

W. G. QUERY, J. P. DERHAM, and F. C. ROBINSON, members of and constituting South Carolina Tax Commission, Defendants and Respondents.

TRANSCRIPT OF RECORD

HAYNSWORTH & HAYNSWORTH,
BOMAR & OSBORNE,
L. W. PERRIN,
HENDERSONS & SALLEY,
Plaintiff's Attorneys.
JOHN M. DANIEL,
Attorney General
J. FRASER LYON,
Defendants' Attorneys.

PETITION AND COMPLAINT FOR INJUNCTION

The plaintiff and petitioner (hereinafter referred to as the plaintiff) complaining of the defendants and respondents (hereinafter referred to as the defendants) respectfully shows to the Court:

1. That the plaintiff is a corporation of the State of South Carolina, having its principal place of business in Aiken County, in said State, and possesses amongst other rights that of suing and being sued. 1

2. That W. G. Query, J. P. Derham and F. C. Robinson are the members and constitute the South Carolina Tax Commission of the State of South Carolina, duly constituted by and under the Statute laws of said State; it having general charge of tax propositions within the State, and having such powers as are given by the Statutes of said State. That said board maintains its offices at the the seat of government, in Columbia, South Carolina, and transacts its business throughout the whole of the State of South Carolina. 2

3. That as its principal business the plaintiff conducts at the present time, and has for many years past conducted, a bleachery in Aiken County, South Carolina, in which it has for many years and at the present time does, in its process of work and manufacture as a bleachery, use in the preparation and manufacture of its goods much gasoline. That for a number of years, and at the present time, it has been and is the practice of said plaintiff to buy said gasoline in bulk from persons residing or doing business in one of the sister states of the State of South Carolina, and of having said gasoline shipped 3 4

into the State of South Carolina in bulk, said gasoline in said large quantities being brought in as an interstate shipment from said sister state in which said dealer furnishing the same resides or has his place of business. That the gasoline so shipped in in bulk is definitely purchased by this plaintiff from said dealer before it leaves its point of shipment in said sister state, and that said gasoline when it reaches the plant of this plaintiff is unloaded and stored and is kept in storage for more than twenty-four hours in the tanks of this plaintiff in Aiken County, South Carolina, until it is needed for use by this plaintiff, and is in its entirety used by this plaintiff in the manufacture and preparation of its goods and in its general activities, and is not brought into the state for the purpose of resale and is in fact not resold to any person whomsever, but is brought into the state and stored with the intention to, and with the purpose of, and is in reality used by the plaintiff itself for its own purposes alone.

4. That it is a fact that one of the large producers of gasoline, namely, the Standard Oil Company, maintains within the State of South Carolina and within Charleston County, as this plaintiff is informed and believes and as in common knowledge, a large so-called refinery in which gasoline is actually manufactured from crude oil, said crude oil being brought into the State in its crude and unmanufactured form, from which, within this State, gasoline is manufactured and produced in said County of Charleston. But it is a fact that this plaintiff for many years past and at the present time has not been purchasing and using gasoline so produced within the State of South Carolina; but to the contrary, has found it advisable to, and has been and is in the manner herein-

before set out, purchasing its gasoline from dealers residing beyond the State of South Carolina, and after said gasoline has been so purchased has been having said gasoline shipped in Interstate Commerce and as in Interstate shipment from the sister state in which said dealer resides and does business, to this plaintiff's plant and factory in Aiken County. 9

5. That the practice above set out has been followed for many years, this plaintiff is informed and believes, by many other bleacheries and many other large users of gasoline residing and doing business within the State of South Carolina, and that this action is brought by the plaintiff not only for itself but that this plaintiff is suing and maintaining said action on behalf of itself and others in like plight who may come in and be liable for the costs and disbursements of this action. 10

6. That prior to the session of the General Assembly of the State of South Carolina of the year 1930, no effort had been made by the defendants to assess or levy taxes upon the bringing in and use by this plaintiff, and others in like plight with this plaintff, of gasolne purchased from parties without the State of South Carolina, where said gasoline was shipped in as Interstate shipment, and the South Carolina Tax Commission has specifically ruled that no tax was assessable against said gasoline. 11

That at the session of the Legislature of the State of South Carolina for the year 1930, an Act was passed entitled: 12

> "An Act to Impose a License Tax on Gasoline, Substitutes therefor, or Combinations thereof, kept, stored or used in the State of South Carolina, which have not been subjected to the payment of a License

Tax under any other Statute of the State of South Carolina, and Providing for the Collection and Distribution of such Tax."

That said Act was approved by the Governor on the 4th day of April, 1930, and is hereinafter referred to as
13 "The Gasoline Tax Act of 1930."

That this plaintiff alleges that on July 7th, 1930, it bought a truck load of two hundred gallons of gasoline from and through a salesman in South Carolina of The Texas Company, a dealer in gasoline having a sales depot in Augusta, in the State of Georgia. That after said purchase had been definitely made said dealer in Augusta,
14 Georgia, shipped and transported said lot of two hundred gallons of gasoline from Augusta, in the State of Georgia, to this plaintiff in Graniteville, in the State of South Carolina, on July 9th, 1930, and said lot of gasoline was there unloaded by this plaintiff and stored in its tanks at its plant in Aiken County, South Carolina, for a period of more than twenty-four hours, with the in-
15 tention on the part of plaintiff when the exigencies of its business made the same necessary and desirable, to use and consume said gasoline in its own business. That said gasoline has not been taxed under Act No. 34 of the Acts of 1925, or Act No. 103 of the Acts of 1929, of the State of South Carolina. That this plaintiff has reported the bringing in and storage of this lot of gasoline
16 to the South Carolina Tax Commission, and has reported that the same consisted of two hundred gallons, and the South Carolina Tax Commission has assessed a tax of six cents per gallon (less allowance for evaporation) amounting to Eleven and 88/100 ($11.88) Dollars thereupon, and has ordered this plaintiff to pay said tax. That this plaintiff has refused to pay said tax, regarding the

same as unlawful and improper, and regarding the Statute upon which it is based as being inapplicable to the course of dealing of the plaintiff herein, and regarding said Statute as being unconstitutional and as being repugnant both to the Constitution of the State of South Carolina and to the Constitution of the United States of America. That upon its refusal to pay said tax the defendant has notified this plaintiff, and has threatened that it will proceed to issue a warrant or execution to the sheriff of Aiken County, or the tax collector thereof, and to collect the same by the seizure and sale of plaintiff's property, and that it claims that said tax constitutes a first lien upon all the property of this plaintiff. 17

That it is the intention of this plaintiff, and as it is informed and believes of other bleacheries in this State, to continue to purchase gasoline for its own use in its manufacturing processes, in Interstate Commerce, and for shipment from sister States in this State. That the purchase of this gasoline alone in bulk lots will within a year amount to approximately thirty-five thousand gallons, all of which will be purchased outright before its shipment and will be shipped from Georgia, Texas and other sister States into South Carolina. 18 19

7. That this plaintiff alleges and charges that the tax levied by the aforesaid Gasoline Tax Act of 1930 is inapplicable to the specific lot of gasoline herein referred to, and is inapplicable to the plaintiff's course of dealing generally as to its gasoline, for the reason that said Act in its sixth section provides: 20

> "Nor shall this Act be construed as applying in the the case of Interstate Commerce."

For, this plaintiff alleges, the lot of gasoline in question was brought in absolutely and directly in Interstate Commerce as the same is defined by the Courts, and that the levying of a tax upon the importation, and upon its storage, and upon plaintiff's course of action generally in bringing other lots of gasoline into this State, will be ap-
21 plying said tax to a "case of Interstate Commerce;" and this plaintiff alleges that a proper construction of said Statute must lead to the holding by the Court that no taxes can be assessed or levied upon the importation of the car load of gasoline referred to.

8. Should the Act in question, however, be construed
22 as being applicable to the lot of gasoline in question and the general course of dealing of this plaintiff and of others in like plight with it, then this plaintiff alleges that said Act levies and assesses a property tax, and not a license tax, and that what is taxes is plaintiff's bringing into the State as an Interstate shipment, property, which it has purchased, and storing its own property for twenty four hours with intent to use it. No act for which a
23 license tax may be levied is involved in so doing. Said act then assesses, this plaintiff alleges, a property tax of six cents a gallon on gasoline which cost plaintiff twelve and one-half cents a gallon, or a property tax of forty-eight per cent., whereas the property tax in the place in Aiken County where said gasoline was in storage was but forty
24 seven mills on the dollar. Hence, this plaintiff alleges, that said Gasoline Tax Act of 1930 is unconstitutional, null and void, and is repugnant to Section 1, Article 10 of the Constitution of South Carolina, in that as applied to the gasoline in question and the course of dealing in question it does not provide for a uniform and equal rate of assessment and taxation. And this plaintiff alleges that the said

tax is in violation of the provisions of said Section 1, Article 10 of the Constitution of the State of South Carolina, in that it does not provide for a uniform and equal rate of assessment and taxation, in that it permits gasoline to be imported and used without taxation, provided the same can be used within twenty-four hours after such shipment loses its Interstate character, and that it is likewise discrimatory, in that it exempts from the operation thereof gasoline which is imported and stored for resale. 25

9. If the Gasoline Tax Act of 1930 is to be considered a license tax, then plaintiff alleges that it is unconstitutional, null and void, and is repugnant to Section 1, Article 10 of the Constitution of the State of South Carolina which permits a graduated license tax on occupations and businesses only, and to the Commerce Clause of the Federal Constitution (Article 1, Section 8, Clause 3) for the reason that the thing taxed and burdened by said Act is the bringing of gasoline, bought and owned by the plaintiff, into the State in Interstate Commerce, and simply storing it as plaintiff's property in this State and not the following of an occupation nor the doing of a business. 26 27

10. That as applied to the lot of gasoline in question which was actually bought by the plaintiff before its shipment from a sister state and which was not shipped for resale but for storage and consumption by its owner, and which has not been resold, and it not for resale, and as applied to a similar course of dealing as to other lots of gasoline this plaintiff alleges that the Gasoline Tax Act of 1930 is unconstitutional, null and void, and is repugnant to the aforesaid Commerce Clause of the Federal Constitution in that goods bought before Interstate ship- 28

ment and which are actually shipped into a state in Interstate Commerce are not subject to a license tax until their owner performs some act as to them which would subject them to loss of their Interstate character, and subject them to a local tax.

29 11. That said Statute as applied to the taxation of the lot of gasoline referred to hereinbefore, and to said method of procedure generally herein described, is unconstitutional, null and void, and is repugnant to the Commerce Clause of the Federal Constitution, to wit: Article 1, Section 8, Clause 3 thereof, and constitutes a burden upon Interstate Commerce; and likewise is repug-
30 nant to the Fourteenth Amendment of the Federal Constitution in that the interstate origin of the gasoline taxed by said Act is made the basis of the classification of the gasoline reached and taxed by said Act, no gasoline produced within the State of South Carolina, or originating in any fashion whatsoever except through an interstate importation being taxed in the hands of the owner, the purchaser, or the prospective consumer, by said Act. This
31 plaintiff alleges that inasmuch as said Act assumes to classify and single out for taxation after it has been imported and stored for twenty-four hours, only gasoline that has been brought and imported from points beyond the State of South Caarolina, that it creates a burden upon Interstate Commerce (upon which subject Congress
32 has legislated) and renders the Statute repugnant to the Commerce Clause of said Constitution, and that as said Act assumes to place a tax upon property brought in from other states and originating as a product of other states, and as a result thereof to force the payment of a tax thereupon on account of its origin beyond the State of South Carolina, and because it is a product of another state, that such Statute is repugnant to the Fourteenth

Amendment of the Federal Constitution, thereby denying to persons within its jurisdiction dealing in the same the equal protection of the laws.

12. That plaintiff alleges that if the Gasoline Tax Act of 1930 is to be considered as levying and assessing a license tax, it is unconstitutional, null and void; and repugnant to the aforesaid Commerce Clause of the Constitution of the United States in that, considered most favorably in favor of its validity, it places a license tax upon the joint acts of importation of gasoline in interstate commerce and storage within this state with intent to consume, which burdens Interstate Commerce certainly as to the importation; and this plaintiff alleges that as license taxes are, under the law, inseparable and must stand or fall as a whole, that the whole Act is unconstitutional. 33 34

13. That this plaintiff alleges that it has no complete or adequate remedy at law, and that its only remedy is an injunction against the defendants restraining them from proceeding to attempt to collect the tax in question, for the following reasons: 35

(a) That the Act in question provides no method whatsoever by which the plaintiff may pay said tax under protest and recover the same from the defendants or from the Treasurer of the State of South Carolina in an action brought for its recovery, should the Courts in any fashion determine that the Statute in question was neither applicable to the car load of gasoline in question nor constitutional. The State has not consented to be sued in that regard. 36

(b) That the Act in question makes the tax in question a first lien upon all of the property of this plaintiff.

That this plaintiff owns much and valuable property in Aiken County, South Carolina. That the defendants under said Act are given authority to issue execution against the property of this plaintiff and to have the same seized and sold under execution, and that said proceeding places a cloud upon the title of the plaintiff's property, both
37 real and personal.

(c) That it is the intention of this plaintiff to continue to buy and import under the mode of procedure herein set out, gasoline into this State from sister States in Interstate Commerce, and that each importation under the terms of the Act is made the subject of the assess-
38 ment of a tax which would follow upon this plaintiff refusing to pay the same, with fresh issuance of executions and sale of plaintiff's property, thereby exposing this plaintiff to a multiplicity of law suits and much vexation.

That for the reasons stated irreparable injury, loss, anxiety, and vexation through the absence of a plain and
39 adequate remedy at law and through the threatened multiplicity of suits and proceedings, is threatened and is about to be visited upon this plaintiff, and for all of such reasons this plaintiff is entitled to injunctive relief, and that all parties in like plight are entitled to the benefit thereof.

40 That a public question is involved, the members of a public board as such are sued, hence the matter herein involved is a matter for cognizance by the Supreme Court in its original jurisdiction.

Wherefore, this plaintiff prays that the judgment of the Court in its original jurisdiction do issue:

(1) Determining the Gasoline Tax Act of 1930 to be inapplicable, specifically to the lot of gasoline referred to herein, and to the course of action generally of this plaintiff and of all others in like plight with it, in bringing in car loads of gasoline in Interstate shipment into this state and in storing the same after such importation. 41

(2) That it said Statute be found to be applicable to the subject matter hereof that said Statute be declared to be unconstitutional, null and void, and to be repugnant in the particulars hereinbefore set out, both to the Constitution of the United States and to the Constition of the State of South Carolina.

(3) That the defendants, and all of their agents, employees and attorneys, be perpetually enjoined from doing any acts whatsoever in connection with or looking to the collection of the tax assessed as a result of the importation and storage of the lot of gasoline in question, and as to any and all other lots of gasoline that may be purchased in like manner by this plaintiff for shipment from sister states, and against proceeding in a like manner against other persons or corporations in like plight, and pursuing a like course as is done by this plaintiff; and that *pendente lite* a rule to show cause and to temporary injunction be issued against the defendants, their agents, employees, and attorneys. 42 43

(4) And for such other and further relief as may be the Court seem meet and proper, and for the costs and disbursements of this action. 44

HAYNSWORTH & HAYNSWORTH,
BOMAR & OSBORNE,
PERRIN & TINSLEY,
HENDERSONS & SALLEY,
Plaintiff's Attorneys.

STATE OF SOUTH CAROLINA,
COUNTY OF AIKEN

Personally appeared before me S. H. SWINT, who being first duly sworn, says: That he is the Treasurer of the GREGG DYEING COMPANY, plaintiff herein, it
45 being a corporation duly chartered and existing under the laws of the State of South Carolina.

That he has read the foregoing complaint and the same is true of his own knwledge, except as to the matters therein stated to be made upon information and belief, and as to such matters he believes it to be true.

S.W.SWINT,

46 Sworn to before me this
11th day of July, 1930.
BELLE DURDEN (Seal)
Notary Public for South Carolina.

STATEMENT

Attached to the foregoing verified complaint was the
47 usual summons directed to the defendants. All of said defendants accepted service of copies of said summons and the foregoing verified complaint, and of the rule to show cause which is next set out, which said rule to show cause was signed by the Hon. Thomas P. Cothran, Associate Justice of the Supreme Court of South Carolina,
48 on the 12th day of July, 1930.

RULE TO SHOW CAUSE

Upon considering the verified petition of the plaintiff herein, and it appearing to the Court that public interests are involved in this proceeding, and that this case

should be determined by the Court in its original jurisdiction,

It is ordered,

That W. G. Query, J. P. Derham and F. C. Robinson, members of and constituting South Carolina Tax Commission, in open Court at Columbia, South Carolina, on 49
the first day of the term next after the expiration of the time fixed in the summons, at ten o'clock A. M., or as soon thereafter as suits the convenience of the Court for the hearing of the issues in this proceeding, do show cause before the Supreme Court of South Carolina, if any they can, why the prayer of the complaint should not be granted, and why the defendants, W. G. Query, J. P. 50
Derham and F. C. Robinson, members of and constituting South Carolina Tax Commission should not be enjoined from carrying out the provisions of an Act entitled, "An Act to impose a License Tax on Gasoline, Substitutes therefor, or Combinations thereof, Kept, Stored, or used in the State of South Carolina, Which Have Not Been Subjected to the Payment of a License Tax Under Any 51
Other Statute of the State of South Carolina, and Providing for the Collection and Distribution of Such Tax," which said Act was approved by the Governor of the State of South Carolina on the fourth day of April, 1930, and that they shall show warrant, if any they can, for executing the provisions of said Act under the Constitution and laws of the State of South Carolina. That, in 52
the meantime, the defendants be, and are hereby restrained from enforcing said Act.

It is further ordered that a copy of the summons and complaint, and Rule to Show Cause, be forwith served on the defendants, and that a copy of the return be served upon the attorneys of the plaintiff herein, within the

time fixed in the summons in this cause for making answer to the complaint.

Let the plaintiff in the meanwhile report to the Tax Commission all gasoline bought by it hereafter in order that the tax may be assessed should the same be de-
53 clared legal by the Court.

T. P. COTHRAN,
Associate Justice.

July 12, 1930.

Within the time allowed for pleading, the defendants interposed and served on the plaintiff the following notice
54 and demurrer:

NOTICE AND DEMURRER

To Messrs. Hendersons & Salley, Haynsworth & Haynsworth, Perrin & Tinsley and Bomar & Osborne, Plaintiff's Attorneys:

You will please take notice, that upon the call of this
55 case for trial, defendants will interpose the following demurrer to the complaint:

The defendants above named demur to the complaint herein upon the ground that it fails to state facts sufficient to constitute a cause of action.

56 In that it appears that the taxes sought to be collected by defendants in the discharge of their official duties are imposed by the terms of an Act approved April 4th, 1930, and that no part of said Act violates the clauses

of the Constitution of the United States, nor of the State of South Carolina, as alleged in the complaint.

JOHN M. DANIEL,
Attorney General.
J. FRASER LYON,
General Counsel for Defendant. 57

I hereby certify that the above demurrer is meritorious and not interposed merely for delay.

J. FRASER LYON,

AGREEMENT AND STIPULATION OF COUNSEL

It is agreed and stipulated by counsel for the plaintiff and by counsel for the defendants that the Supreme 58
Court of South Carolina be, and it is, hereby requested and authorized upon its determination of the demurrer which has been interposed herein, and in accordance with its determination of said demurrer, to render final judgment in this cause, it being stipulated and admitted by both the plaintiff and the defendants herein that the allegations of the complaint are true and correct, and 59
that, therefore, the determination of the facts underlying and surrounding the case in any other form whatsoever is unnecessary.

It is further stipulated and agreed, however, that in addition to the facts stated in the complaint, that the Court in determining the demurrer, and also in render- 60
ing final judgment be requested, and is hereby authorized to consider the additional fact by that:

Since the bringing of this action the plaintiff has purchased from a dealer in Louisana a full carload of gasoline, which purchase was consummated before said carload of gasoline was shipped, and that said carload

of gasoline was shipped through Louisiana, through the States of Mississippi, Alabama, and Georgia, and into the State of South Carolina in Interstate Commerce. That it was unloaded by the plaintiff at Graniteville, South Carolina, and was there stored for more than twenty-four hours to be used for its manufacturing pur-
61 poses, and that said fact has been reported to the South Carolina Tax Commission. That said car contained 80,011 gallons, and that the tax thereon at six cents a gallon would be $480.66.

That it is further stipulated that a printed copy of the so-called *Gasoline Tax Act of* 1930 approved April 4,
62 1930, be incorporated and be bound in the record herein.

We consent:

HAYNSWORTH & HAYNSWORTH,
BOMAR & OSBORNE,
L. W. PERRIN,
HENDERSONS & SALLEY,
Plaintiff's Attorneys.

63 JOHN M. DANIEL,
Attorney General.
J. FRASER LYON,
Defendants' Attorneys.

64

AGREEMENT

We, the undersigned, counsel for the plaintiff and petitioner herein, and counsel for the defendants and respondents herein, do agree and stipulate that the foregoing, together with a copy of the printed Act referred to hereinbefore, shall constitute the record for the hearing and consideration of the foregoing matter by the Supreme Court of South Carolina in its original jurisdiction.

65

HAYNSWORTH & HAYNSWORTH,
BOMAR & OSBORNE,
L. W. PERRIN,
HENDERSONS & SALLEY,
Plaintiff's Attorneys.

66

J. FRASER LYON,
Defendants' Attorneys.

67

68

[fol. 19]

IN SUPREME COURT OF SOUTH CAROLINA

Case No. 919

GREGG DYEING COMPANY, Petitioner,

v.

W. G. QUERY, J. P. DERHAM and F. C. ROBINSON, Members of and Constituting South Carolina Tax Commission, Respondents

In the Original Jurisdiction

Petition Denied

Hendersons & Salley, of Aiken, Bomar & Osborne, and Perrin & Tinsley, all of Spartanburg, and Haynsworth & Haynsworth, of Greenville, for petitioner.

J. Fraser Lyon, and John M. Daniel, Attorney General, both of Columbia, for respondents.

OPINION AND JUDGMENT—Filed April 13, 1931

COSGROVE, A. A. J.:

In the original jurisdiction of the Court, petitioner has brought this action seeking to enjoin respondents as members of the South Carolina Tax Commission from the enforcement as to it, and others in like plight, of the provisions of a statute which it denominates as the "Gasoline Tax Act of 1930".

The Act in question, approved April 4th, 1930, is entitled: "An Act to impose a license tax on gasoline, substitutes therefore, or combinations thereof, kept, stored or used in the State of South Carolina, which have not been subjected to the payment of a license tax under any other statute of the State of South Carolina and providing for the collection and distribution of such tax."

Section I provides:

"Any person, firm, corporation, municipality, county, or any subdivision thereof, in the State of South Carolina which shall import into this State from any other State or

foreign country, or shall receive by any means into this State, and keep in storage in this State for a period of twenty-four hours or more, after the same shall have lost its interstate character as a shipment in interstate commerce, any gasoline or any other like products of petroleum or under whatever name designated, which is intended to be stored or used for consumption in this State, shall pay a license tax of six cents per gallon for every gallon of gasoline, etc. aforementioned, which shall have been shipped or imported into this State from any other State or foreign country, and which shall hereafter, for a period of twenty-four hours after it loses its interstate character as a shipment in interstate commerce, be kept in storage in this State to be used and consumed in this State by any person, firm, or corporation, etc. and which has not already been subjected to the payment of the license taxes imposed upon the sale thereof by Acts of the General Assembly of the [fol. 20] State of South Carolina", designating particularly the Acts of 1925 and 1929 imposing license taxes for the privilege of "dealing in gasoline or like products of petroleum, as therein defined.

Section 6 provides:

"Nothing within this Act shall be construed to impose a license tax upon any selling agent, consumer, or retailer, selling, consigning, shipping, distributing or using gasoline, combinations thereof, or substitutes therefor, which may have been bought from any oil company on which the license taxes imposed by Act No. 34, Acts of the General Assembly of 1925, approved the 23rd of March, 1925, and Act No. 102, Acts of the General Assembly of 1929, approved the 16th day of March, 1929, have been paid nor shall this Act be construed as applying in the case of interstate commerce."

In substance, petitioner alleges that it conducts a bleachery in Aiken County, South Carolina, and in the process of its work and manufacture uses much gasoline; that at present and for a number of years heretofore it has been its practice to buy its gasoline in bulk from persons residing or doing business without the State of South Carolina; that such gasoline is purchased outright at the place of business of the out-of-state dealer, and the product so pur-

chased is shipped in interstate commerce to its plant, where, upon arrival, it is unloaded and stored and kept in storage in its own tanks for more than twenty-four hours, until needed for use in its manufacturing processes and for its own purposes alone; that though there is at Charleston, South Carolina, a refinery conducted by the Standard Oil Company, at which large quantities of gasoline are produced, it has not in the past or present purchased such gasoline, but "has found it advisable" to purchase its gasoline from dealers beyond the State of South Carolina in the manner above outlined. That this practice is followed not alone by petitioner but also by other large users of gasoline in South Carolina in like plight. That it is its intention to continue the purchase of gasoline for its own use in its manufacturing processes as above stated, its annual purchases in bulk from without the State of South Carolina being estimated at approximately thirty-five thousand gallons.

This Court is asked to declare the Act of 1930 inapplicable to plaintiff and others in like plight upon the facts alleged: and, that, if found applicable, the same be declared unconstitutional under both the State and Federal Constitutions in the particulars set forth.

To the petition herein the Attorney General, on behalf of Respondents, filed a general demurrer to the effect that "no part of said Act violates the clauses of the Constitution of the United States, nor of the State of South Carolina, as alleged in the Complaint."

The following questions are presented:

First. Under the Federal Constitution,

(a) The act burdens Interstate Commerce.

(b) The Act discriminates against gasoline produced in other States.

(c) The Act taxes two things: (1) Interstate importation, (2) Storage with- the State; that these two essentials are inseparable for the purposes of the tax and hence Act discriminatory and burden on Interstate Commerce.

Second. Under the State Constitution,

[fol. 21] (a) The tax is a property tax repugnant to Section 1 Article X, of the Constitution.

(b) The tax is not an excise tax but is a license tax within the constitutional definition, applying only to "occupations and businesses", and as to petitioner contravenes this constitutional provision.

The Act in question may be said to be complementary to the other statutes of South Carolina under which are assessed a gallonage tax on gasoline and other petroleum products. Indeed, it expressly excludes from its provisions all gasoline upon which a like tax has been paid under other statutes. It so declares in its title and specifically designates in its body the statutes, payment of the tax under which exempts from its burden.

It is a settled rule of statutory construction that it is the duty of the Court to ascertain the intent of the Legislature and to give it effect so far as possible within constitutional limitations. When a Statute is a part of other legislation, designed as a whole to establish an expressed state policy, the Court should strive to effectuate that policy. To aid in its construction, the statute must be read in the light of cognate legislation. Tallevast v. Kaminski, 146 S. C. 225, and, in construing statutes on the same subject, "they shall be taken together and construed in pari materia even though there be no express reference by the latter statute to the former." State v. Fields, 2 Bailey, 554; 25 R. C. L. p. 1060.

See also, Columbia Gas Light Co. v. Mobley, 139 S. C. 113.

"The rule that statutes in pari materia should be construed together applies with peculiar force to statutes that are contemporaneous." 25 R. C. L. p. 1062.

This Court has said:

"There is no rule better supported by justice and wisdom than that, when there are several statutes on the same subject, they should be read together as *one act*, so far as their provisions are consistent; as by this means, the mischief, the remedy, and the intention, of the legislature, are more distinctly seen and applied." (Emphasis ours.)

Richards v. McDaniel, 2 Mill Const. Rep. p. 18.

While, as a general rule, reference to statutes in pari materia for purposes of construction has been made largely

where there is ambiguity in the language of the statute construed, yet this principle has not been limited solely to such instances.

"Statutes in para materia must be construed together and given a construction, if possible, which violates no constitutional provision." (Syllabus.)

Neil v. Independent Realty Co. (Mo.) 70 A. L. R. 550.

Again:

"The two acts are cognate parts of a single purpose the liquidation and retirement of designated road and bridge bonds—in the accomplishment of which purpose the provisions of the two acts are inextricably inter-related. They should, therefore, be construed in *para materia* as one en-[fol. 22] actment." (Emphasis ours.)

Amos v. Matthews (Fla.) 126 So. 313.

In South Carolina, commencing about a decade ago, the General Assembly expressed its public policy as to revenue to be derived from the use of gasoline Vol. 32 Stat. at Large, p. 835. The tax then imposed was two cents a gallon. In 1925, the tax was increased to five cents, and in 1929, to six cents on the gallon. These Statutes, however, only reached "dealers" in this commodity.

They provided:

"That every oil company, person, firm or corporation doing domestic or intra state business within this State, and engaging in the business of selling, consigning, using, shipping, or distributing for the purpose of sale within this State, any gasoline or any substitute therefor, or combination thereof, for the privilege of carrying on such business, shall be subject to the payment of a license tax, which tax shall be measured by and graduated in accordance with the volume of sales of such oil company within the State. Every such oil company shall pay to the State an amount of money equal to six (6) cents per gallon on all gasoline, combinations thereof, or substitutes therefor, sold or consigned, used, shipped or distributed for the purpose of sale within the State." Acts, 1929, p. 107.

Statutes of this nature have been uniformly construed as imposing a tax on the ultimate consumer or user, as will be hereafter shown.

Realizing that large users of gasoline either were evading or would evade the payment of the tax imposed under these Acts, by bringing in Gasoline in quantities from without the State, and storing it for their own purposes, the Legislature in 1930 enacted the statute under consideration, applying the six cents tax to every person, firm, corporation, municipality or any subdivision subject to its terms. The mischief and evil aimed at are apparent.

Thus, with the Act of 1930 complementing the other statutes referred to, all consumers of gasoline in South Carolina pay a tax of six cents per gallon, no matter what the origin of, or state in which, the gasoline is produced.

Petitioner frankly states that it is to its advantage to buy its gasoline in other states than South Carolina, and to use, consume and enjoy the same to its profit without paying to the State of South Carolina the tax required of all others.

It attempts to defend its position on the ground that the Act of 1930 is unconstitutional, null and void and asks this Court so to declare.

At the outset there are certain cardinal principles to be observed.

A Court will not declare an Act of the Legislature unconstitutional unless the same appears beyond a reasonable doubt.

"To doubt the constitutionality of a law is to resolve the doubt in favor of its validity." 6 R. C. L. 76.

In determining its constitutionality, "every presumption is to be indulged in favor of the validity of the Statute." Graves v. Minnesota—272 U. S. 425; 71 L. Ed. 331.

[fol. 23] Under settled practice, a preference is always given to the construction of a statute upholding its constitutionality where it is fairly susceptible of two constructions. Missouri P. R. Co. v. Boone, 270 U. S. 446; 70 L. Ed. 688.

On more than one occasion this Court has said:

"It is a grave matter to declare a solemn enactment of the Legislature, a co-ordinate branch of the government, invalid, and that the Court in its deliberations and conclusions should be guided by the well settled principle that the unconstitutionality of an Act must be shown beyond a

reasonable doubt." Wingfield v. S. C. Tax Commission, 147 S. C. 122 and cases cited.

Santee Mills v. Query, 122 S. C. 162.

In the light of these principles and the history of this legislation we shall now consider the objections to the Act raised by petitioner.

In our research we have found two cases from the Appellate Courts of sister states, in which statutes of like import were considered and upheld, against objections in every way the same as those here presented. Sheip v. Amos (Fla.), 130 So. 699; Foster & Creighton Co. v. Graham (Tenn.), 285 S. W. 570, 47 A. L. R. 971. The South Carolina Act, we were told in the argument before us, is substantially a duplicate of the Florida statute upheld in the Sheip case.

We might be content, therefore, to rest our decision on these authorities and sustain this Act, with nothing more. We think, however, that the importance of the questions presented and the asserted difference of our state constitutional provisions warrant a full and fair consideration and determination of the issues.

The Federal Questions

1. Does this Statute burden Interstate Commerce within the meaning of the Federal decisions?

Under the facts alleged, petitioner purchases at a point without the State of South Carolina its gasoline in tank car lots on some occasions and on others in large drums. At any rate, the gasoline is delivered at its plant in Aiken County in these "original packages", and upon delivery it is transferred from the "original packages" to its own tanks and stored for future use.

On its face, the Act expressly negatives an intention to tax interstate commerce. It does not purpose to tax any gasoline until twenty-four hours after it has lost its interstate. character. It seeks to operate only after the commodity has been severed from its interstate character and has become at rest as a part of the general mass of property in this State subject to the protection of its laws. Its immunity from State taxation is then at an end.

"The beginning and end of the transit which constitutes interstate commerce are easy to mark. The first is defined in Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. Rep. 475, to be the point of time that an article is committed to a carrier for transportation to the State of its destination, or started on its ultimate passage. The latter is defined to be, in Brown v. Houston, 114 U. S. 622, 69 L. Ed. 257, 5 Sup. Ct. Rep. 1091, the point of time at which it arrives at destination."

[fol. 24] General Oil Co. v. Crain, 209 U. S. 229; 52 L. Ed. 764; A. C. L. R. R. Company v. Standard Oil Co., 12 F. (2nd) 541, 60 A. L. R. 1456.

In support of its contention that the tax question, nevertheless, is a burden on Interstate Commerce under its practice as above outlined, petitioner cites,

Standard Oil Co. v. Graves, 249 U. S. 389.
Askren v. Continental Oil Co., 252 U. S. 444.
Bowman v. Oil Co., 256 U. S. 646.
Texas Co. v. Brown, 258 U. S. 470.
Sonneborn Bros. v. Cureton (Keeling), 262 U. S. 513.
Hart Refineries v. Harmon, 278 U. S. 499.

It would serve no useful purpose to review these decisions individually. With the exception of the last, a later case they were all reviewed and considered by the United States Supreme Court in Sonneborn Bros. v. Cureton, supra, in an elaborate opinion by its late distinguished Chief Justice Taft. Speaking for the Court, he said:

"The question we have to decide is whether oil transported by appellants from New York or elsewhere outside of Texas to the warerooms or warehouse in Texas, there held for sales in original packages of transportation, and subsequently sold and delivered in Texas in such original packages, may be made the basis of an occupation tax upon appellants, when the tax applies to all wholesale dealers in oil engaged in making sales and delivery in Texas."

"Our conclusion must depend on the answer to the question: Is this a regulation of, or burden upon, interstate commerce? We think it is neither. The oil has come to a state of rest in the warehouse of appellants, and had

become a part of their stock, with which they proposed to do business as wholesale dealers in the state. *The interstate transportation was at an end*, and whether in the original packages or not, a state tax upon the oil as property, or upon its sale in the state, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject." (Emphasis ours.)

As to the holdings and language of the cases above cited by petitioner which would indicate that a tax on gasoline brought into a state and sold in original packages of interstate commerce would be a burden on that commerce, the Court said:

"Upon full consideration and after a re-argument, we cannot think this extension of the exemption referred to, if intended to apply to oil sold after arrival in the state to be justified either in reason or on previous authority; and to this extent the opinions in the cases cited are qualified."

It follows, therefore, that if a state may tax the sale of such products free from the inhibition of the commerce clause of the Federal Constitution, a tax upon the storage for use and consumption of like products upon their coming to rest in the state is valid.

[fol. 25] The case of Texas Co. v. Brown, supra, likewise supports this view. In construing the legality of a tax for inspection purposes under a Georgia statute, the Supreme Court said:

"Aside from this, the authority of defendants to tax the products *or their storage* or sale commences when they have come to rest; ordinarily, when transferred from the tank car to the storage tank and added to plaintiff's stock-in-trade kept therein for local distribution and sale". (Emphasis ours.)

In Hart Refineries v. Harmon, supra, decided in 1928, the extent of the Sonneborn decision was construed. After reiterating its conclusions above set forth, the Court said:

"But there is nothing in the opinion to suggest that the taxing power of the state is limited to the two kinds of taxes mentioned. Interstate transportation having ended, the taxing power of the State in respect of the commodity which was the subject of such transportation, may, so far as the commerce clause of the Federal Constitution is concerned, be exerted in any way which the state's Constitution and laws permit, of course, it does not discriminate against the commodity because of its origin in another state. That under such circumstances a tax may be imposed upon *the use* as well as upon the sale of the commodity in domestic trade, without coming in conflict with the commerce clause, was specifically determined in Bowman v. Continental Oil Co. 256 U. S. 642, 648, 65 L. Ed. 1139, 1145, 41 Sup. Ct. Rep. 606". (Italics ours.)

See also

Wright v. Fulton County (Ga.), 150 S. E. 262.
Sheip v. Amos, supra.
Foster & Creighton Co. v. Graham, supra.

Our conclusion, therefore, is that there is nothing in the Act itself or in the manner of its enforcement to give countenance to the assertion that it regulates or burdens Interstate Commerce.

But, says petitioner, conceding these decisions to apply, the Act still is unconstitutional because all gasoline stored in South Carolina is not subject to the tax and hence the Act discriminates against the commodity because of its origin in another state. This brings us to petitioner's remaining objections under the Federal law, II and III. The Act is assailed under these heads because:

(1) It discriminates, it is asserted, against the products of other states because of their origin; and (2) in that, it is argued, it taxes both interstate importation and storage within the state, and as such is discriminatory under the Equal Protection Clause of the Constitution, and, in addition, in the respect set forth, burdens Interstate Commerce. For the sake of brevity we shall discuss these objections together.

It is a settled principle of Federal law that a state cannot, consistently with the Federal Constitution, impose upon the products of other states, brought therein, for sale

or use, more onerous public burdens or taxes than it imposes on like products of its own territory.

Guy v. Baltimore, 100 U. S. 439.
Webber v. Virginia, 103 U. S. 350.
[fol. 26] Darnell v. Memphis, 208 U. S. 113.
Cheney Bros. v. Massachusetts, 246 U. S. 147.
Bethelem Motors Co. v. Flynt, 256 U. S. 421.
Sonneborn Bros. v. Keeling, supra.

However:

"The power of the state to classify for purposes of taxation is of wide range and flecibility, provided that the classification rest upon a substantial difference so that all persons similarly circumstanced will be treated alike. Statutes which tax one class of property while exempting another class necessarily result in imposing a greater burden upon the property taxed than would be the case if the omitted property were included. But such statutes do not create an inequality in the constitutional sense. Nor is the imposition of an excise tax upon one occupation or one activity from which other and different occupations or activities are exempt, a denial of equal protection. It is enough if all in the same class are included and treated alike."

(Hart Refineries v. Harmon, Supra.)

The tax here imposed is an excise tax and not a property tax. Bowman v. Continental Oil Co. 256 U. S. 642, 65 L. Ed. 1139.

Constitutional requirements, both State and Federal, as to equality and uniformity, are in strictness applicable only to advalorem taxes on property and not to excises. It is sufficient if the excise imposed has a reasonable basis of classification, all in the same class are included and treated alike, be geographically uniform, and does not unreasonably burden interstate commerce.

The public policy of the State of South Carolina, as expressed in this legislation, taking it as a whole, is that all consumers shall pay the gallonage tax of six cents. Under the cognate Acts of 1925 and 1929, while the tax is directly imposed upon the seller, the burden actually rests upon the ultimate consumer.

"That the Legislature intended the effect of the tax to fall upon the ultimate consumer is evident, not only from

the obviously inevitable result of requiring its payment, ordinarily, by the first domestic seller, but * * * (the tax applies, we interpolate) likewise to all such commodities that may be sold elsewhere and brought into the State of Georgia for consumption and use". Texas Company v. Brown, supra; Panhandle Oil Co. v. Miss. 277 U. S. 218, 72 L. Ed. 857.

See, also, Shanks v. Kentucky Ind. Oil Co. (Ky.) 8 S. W. (2nd) 385.

By the Act under consideration, the Legislature proposed to extend the consumption tax on gasoline in South Carolina. It taxes all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes. By the kindred Acts all users are taxed. All Oil Companies in South Carolina, including the Standard Oil Company in Charleston, S. C. are required to pay and do pay the tax upon any gasoline they sell and all that they use in South Carolina, whether it be for operating their trucks upon the highways or otherwise (34 Stat. at Large, p. 197).

The Act of 1930 puts gasoline imported in interstate commerce and thereafter stored to be used and consumed in South Carolina on the same basis, as to taxation, as domestic gasoline, that is, gasoline produced in this state and used and consumed in this state.

[fol. 27] "Apparently" said the Supreme Court of the United States in Texas Co. v. Brown, supra, "it was intended to cover the case of large consumers who might otherwise find it advantageous to bring in, and store until needed, quantities of oil or gasoline sufficient for their own consumption, thus escaping dealers profit and inspection tax as well. We find in its provisions nothing to raise a question about the validity of the system."

The tax applies only to persons who store with intent to use and consume the gasoline in South Carolina. The class sought to be reached by the tax is clear. The tax is single upon the use and consumption in South Carolina of gasoline, whether imported or not. Mere storage after manufacture or production is not enough to provoke the application of the tax. The only kind of storage affected is that with intent to use and consume the product in South Carolina.

Such intention on its part petitioner admits to exist in the instant case, and in all future transactions. The fact that the Standard Oil Company at Charleston, S. C., manufactures and produces large quantities of gasoline which is stored at its refinery and which is untaxed before its sale or use in South Carolnia, does not, to our mind, work a discrimination against petitioner or producers in other states, It is admitted that that Company, like all others, is required to pay and does pay a tax of six cents on all of its product sold in South Carolina or used and consumed in its business. The equality and uniformity of the tax is apparent.

That a tax free period of twenty-four hours on all gasoline brought into the State by petitioner and others in like plight is allowed by the Act, cannot, we think, be a ground of complaint on the part of petitioner.

Taking then, these Gasoline Tax Acts as a whole and construing them as one enactment as we must in order to ascertian the intention of the Legislature and to give full force and effect to the expressed public policy of the State to lay a gallonage tax on all gasoline sold, used and consumed in South Carolina, regardless of origin, it is our opinion that these objections to the Act of 1930 under the Federal Constitution cannot be sustained.

But, aside from these considerations, the tax is valid as a reasonable a lawful exercise of the police power of the State in the protection of the welfare and safety of its citizens.

"While passed primarily for revenue purposes, and to forestall the evasion of the sales tax (see Texas Co. v. Brown, 258 U. S. 466, 481; 66 L. Ed. 721, 728) the Statute is also regulatory in effect. The storage of gasoline in large quantities is inimical to public safety. If no financial advantage can be gained by storing it, one of the most substantial inducements to store it is removed. That result is accomplished by imposing a storage tax equivalent to the sales tax, thus tending to curb the practice of storing. See Foster & Creighton v. Graham 285 S. W. 570, 47 A. L. R. 971." Sheip v. Amos, supra.

See also

Railroad Commission v. So. Ry. Co., 127 S. C. 15.
Bowman v. Continental Oil Co., supra.
Texas Co. v. Brown, supra.

The State Questions

1. Is the tax a property tax and hence repugnant to Section 1, Article X, of the Constitution of South Carolina? [fol. 28] This section of the Constitution provides that "the General Assembly shall provide by law for a uniform and equal rate of taxation," etc.

If the tax is a property tax, this section applies; if an excise, it is inapplicable.

A tax of like character has been determined to be an excise tax and not a property tax. Bowman v. Continental Oil Co. supra; O'Berry v. Mecklenburg County (N. C.) 151 S. E. 880.

"An excise and a property tax, when the two approach each other, ordinarily may be distinguished by the respective methods adopted of laying them and fixing their amounts. If a tax is imposed strictly by the Legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the payer irrespective of the value of the taxpayers' assets, it is regarded as an excise; but if the tax is computed on the valuation of property, and assessed by assessors either where it is situated or at the owners' domicile, although privileges may be included in the valuation, it is considered a property tax." (26 R. C. L. p. 35.)

In a very recent case, the Supreme Court of the United States used this language:

"While taxes levied upon or collected from persons because of their general ownership of property may be taken to be direct (Pollock v. Farmers Loan & T. Co. 157 U. S. 429, 39 L. Ed. 759, etc.) this Court has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise." Bromley v. McCaughn, 280 U. S. 124; 74 L. Ed. 226.

The tax under the Act of 1930 is, of course, not assessed against the value of the gasoline stored, used or consumed, for regardless of its market price, the tax remains the same.

Petitioner in support of its claim under this head relies solely on the case of Dawson v. Kentucky Distilleries, 255 U. S. 288, 65 L. Ed. 638. This decision is fully analyzed and considered in the Sheip and Foster & Creighton Co. cases, supra. In each of these cases petitioners attacked like statutes on the ground that the taxes assessed under them were property taxes. The contention was overruled. It would serve only to lengthen this already growing opinion to go over the same ground. We are satisfied with the conclusions reached on this point by those eminent tribunals.

II. Akin to the foregoing objection of petitioner to the Act under the State Constitution is its remaining ground that the tax is a license tax upon the mere storing of one's property, whereas the Constitution allows license taxes only on "occupations and businesses".

As shown above, the tax herein considered is an excise tax. It is not a license tax on an occupation or business. 17 R. C. L. 474, et seq.

The origin of excise taxes we have had neither the time nor the opportunity to explore. It is certain that in the days of Blackstone, they were not only well established but much complained of. An excise on tea gave birth to this nation. The value and power of such a tax was so well recognized at the time of the adoption of the Federal Constitution that the authority to impose excises was expressly in [fol. 29] that instrument delegated to the Federal Government by the States. Many State Constitutions, notably of the older Commonwealths, likewise expressly authorize or restrict the imposition of such taxes in eonomine.

Attempts have been made to define such a tax, but definitions are short lived and must change as new conditions arise to require a new exercise of the power defined.

It has been generally recognized that excises are "taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges". Cooley, Const. Lim. 7th Ed. 680. Flint v. Stone Tracy Co., 220 U. S. 107, 55 L. Ed. 389; Patton v. Brady, 184 U. S. 608, 46 L. Ed. 713; Maine v. Grand Trunk R. Co., 142 U. S. 217; 35 L. Ed. 994.

"If a tax on the use or consumption of gasoline is intrinsically an excise tax, as held by the United States Su-

preme Court, then it is an excise tax everywhere. The Constitution of the State does not affect at all the generic quality of the tax, but merely the right of the State to impose it." Foster & Creighton Co. v. Graham, supra.

In South Carolina, neither the Constitution of 1868 nor 1895 expressly or impliedly makes reference to excise taxes, though their existence must naturally be assumed to have been known to the framers of these instruments. The lack of restriction in them on the inherent power of the Legislature to impose such taxes affords ground for the conclusion that the power was purposely left unrestricted while the mode of exercising other taxing powers was provided for.

As was so well said in State v. Hayne, 4 S. C. 419:

"Where the Constitution undertakes to regulate the exercise of the taxing power, by prescribing the mode by which the revenues of the State shall be raised, in the absence of the expression of a clear intent to exclude other modes of raising revenue than that prescribed, such regulation, while it must be construed as imposing a political duty on the Legislature, cannot be held as circumscribing its constitutional powers so as to exclude a resort to other means of raising revenue where, in its judgment, an exigency exists calling for a resort to such auxiliary means of raising revenue."

See also
Lillard v. Melton, 103 S. C. 16.
Alderman v. Wells, 85 S. C. 507.

"It is elementary, of course, that the power of the Legislature is plenary in the absence of any Constitutional limitation." Walpole v. Wall, 158 S. C. 114; that a State Constitution is not a grant of power but rather a limitation of legislative power, Evans v. Beattie, 137 S. C. 512; and that "the right to tax is not granted by the Constitution". Peoples v. Rearden, 8 L. R. A. (N. S.) 320.

"Except insofar as it is limited by the State and Federal Constitutions, the taxing power of the State is general and absolute and extends to all persons, property and business within its jurisdiction or reach". Santee Mills v. Query (supra).

Hence, there have been heretofore recognized in South Carolina, such excise taxes as those on inheritances, documentary stamps, corporate privileges and franchises, the sale of gasoline, and the like.

[fol. 30] We find no inhibition in our State Constitution and hold that the Legislature has the power to exact this tax.

The contention of petitioner that this tax, even if an excise tax, is invalid because it subjects to taxation the mere right to own, hold and possess property, likewise cannot be sustained. The cases cited in support of this contention were fully considered in Sheip v. Amos, supra, from Florida, and Foster & Creighton Co. v. Graham, supra, from Tennessee, and clearly demonstrated to be inapplicable to the questions presented. With their conclusions we are fully in agreement.

As a protest, rather than an objection to the statute, petitioner finally urges that it is unjust to tax it and others in like plight for gasoline used in the process of manufacture, while other users of gasoline are benefited by the tax imposed through use of the resultant good roads for the construction and maintenance of which the tax is expended. But, any benefit or improvement to the State as a whole must necessarily affect every citizen thereof, directly or indirectly. At any rate, there is nothing in the State or Federal Constitution which requires a State to apply such fees to the benefit of those who pay them. Carey & Hamilton v. Snook, 281 U. S. 66; 74 L. Ed. 704.

We conclude, therefore, that as against the objections raised by petitioner, the Act of 1930 herein considered is valid and Constitutional under both the State and Federal Constitutions.

As Counsel for both parties have stipulated that if the Act be upheld, this Court should render final judgment in the cause, it is

Ordered, adjudged and decreed that the temporary injunction herein is dissolved, the prayer for a permanent injunction denied, the petition dismissed, and that Respondents have judgment against Petitioner in the sum of Four Hundred Ninety-two and 54/100 ($492.54) Dollars, the amount of taxes assessed against the two ship-

ments involved in this cause, pursuant to the terms and provisions of said Act.

And it is so ordered.

Blease, C. J.; Stabler and Carter, JJ., concur. Cothran, J., dissents.

IN SUPREME COURT OF SOUTH CAROLINA

DISSENTING OPINION

COTHRAN, J. (dissenting):

I will assume the correctness of the holding in the opinion of Mr. Justice Cosgrove that the tax provided for in the Act of 1930, is an excise tax and not a license tax upon an occupation or business. As a matter of fact however the title of the Act purports to impose a license tax upon gasoline (how this can be done is inconceivable), while the body of the Act requires the payment of a license tax by the "person, firm, corporation, municipality, County or subdivision thereof", which imports into this State and keeps in storage gasoline intended to be stored or used, of six cents per gallon.

(Attention should also be called to the fact that the tax is sought to be imposed upon importations from a foreign country, which is clearly contrary to the Constitution. But as such an importation is not involved in the present suit, this objection may be waived.)

The Sonneborn case, 262 U. S. 506, draws a distinction between importations from a foreign country and interstate commerce; it abrogates the rule which had been ap- [fol. 31] plied by what is known as the "Original Package" cases, the basis of which was that a sale and delivery after the transportation had been completed was a part of the interstate movement, and declares that an interstate shipment after delivery to and storage by the consignee and subsequently sold and delivered in original package in the State of delivery, may be made the basis of an occupation tax upon the consignee.

Assuming that a delivery to and storage by the consignee, without a sale comes within the same rule, I think that the condition upon which the Sonneborn case was de-

cided, does not exist in the present case. That condition is thus expressed in the Sonneborn case:

"* * * when the state tax applies to all wholesale dealers in oil engaged in making sales and deliveries in Texas. * * * The oil had come to a state of rest in the warehouse of the appellants and had become a part of their stock with which they proposed to do business as wholesale dealers in the State. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil as property or upon its sale in the State, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject. * * * A state tax upon merchandise brought in from another State or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another State."

It is clear from the terms of the Act of 1930 that it applies exclusively to importations "from any other State or foreign country", which constitute, as recognized by the Act, "interstate commerce."

It is alleged in the complaint and admitted by the demurrer, that gasoline is manufactured from the raw product in South Carolina; the Act has no application to it; necessarily a discrimination against interstate commerce. The fact, if it be a fact, that the tax is being collected from such manufacturers in this State does not alter the situation; they are not required under the Act to pay it while in storage.

This I think is sufficient to show the unconstitutionality of the Act in its present form; I am not to be understood as approving or disapproving the conclusions announced in the leading opinion upon other questions involved in the appeal.

[fol. 32] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

PETITION FOR APPEAL AND SUPERSEDEAS

To the Honorable Eugene S. Blease, Chief Justice of the Supreme Court of South Carolina:

And now comes Gregg Dyeing Company, the plaintiff and petitioner herein, by P. F. Henderson, Henderson & Salley, Bomar & Osborne, Perrin & Tinsley and Haynesworth & Haynesworth, its attorneys, and feeling aggrieved by the opinion and order of this Court, entered on the 13th day of April, 1931, in so far as the same refused to grant the permanent injunction prayed for in plaintiffs and petitioners complaint herein, and in that said opinion and order granted a final judgment against this plaintiff, and hereby prays that an appeal may be allowed it from said opinion, decree and final order to the Supreme Court of the United States, and that the Clerk of the Supreme Court of South Carolina may be directed to prepare and certify a transcript of the records and proceedings in said cause to the United States Supreme Court at Washington, D. C., in accordance with its rules and practice, and for the reasons specified and set out in the assignment of errors filed herewith, in order that the errors complained of in the said [fol. 33] assignment of errors may be reviewed, and if error be found corrected according to the laws and customs of the United States, and that all further proceedings herein after the allowance of said appeal by transferred to said Supreme Court of the United States of America.

Petitioner further prays that an order of supersedeas may be granted herein pending the final disposition of the cause, and that the amount of the security therefor, and for costs, be fixed by the order allowing this appeal.

Gregg Dyeing Company, by P. F. Henderson, Hendersons & Salley, Bomar & Osborne, Perrin & Tinsley, Haynesworth & Haynesworth, Its Counsel.

[fol. 34] In Supreme Court of South Carolina

[Title omitted]

Order Allowing Appeal and to Operate as Supersedeas

The plaintiff and petitioner herein having prayed for the allowance of an appeal to the Supreme Court of the United States from the decree made and the final judgment entered in said cause by the Supreme Court of the State of South Carolina on the 13th day of April, 1931, in so far as the same refused the issuance of an injunction against the defendants, and in so far as the same granted absolute judgment against the plaintiff, all against the prayer of the plaintiff in its complaint herein, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statute and rules of the Supreme Court of the United States in such cases made and provided, it is now hereby

Ordered

That an appeal be and the same is hereby allowed as prayed for to the Supreme Court of the United States in this cause, and as provided by law; and

It is further ordered that the Clerk of this court shall [fol. 35] prepare and certify a transcript of its record and proceeding, and decree and final order, in accordance with the statutes and rules of the Supreme Court of the United States, and transmit the same to the Clerk of the Supreme Court of the United States at Washington, D. C., so that he shall have the same in said Court within thirty days from this date; and

It is further ordered that this order operate as a supersedeas, and that the supersedeas bond be and the same is fixed in the sum of One Thousand Dollars ($1000.00); and

It is further ordered that the security for costs be and the same is hereby fixed in the sum of Two Hundred and fifty dollars ($250.00).

Let said bond, which may be combined in the sum of Twelve Hundred and fifty dollars ($1250.00), be approved by the Clerk of this Court.

Eugene S. Blease, Chief Justice of Supreme Court of South Carolina.

June 11, 1931.

[fol. 36] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes Gregg Dyeing Company, the Plaintiff and petitioner herein, through its counsel and presents this assignment of errors, and says that in the records and proceedings in the above entitled cause and the resultant decree and opinion of the Supreme Court of South Carolina made and entered against it on the 13th day of April, 1931, there is error in the particulars herein set out; that is to say:

1

That the Court erred in making the decree herein.

2

That the Court erred in holding that the Act of the General Assembly of the State of South Carolina approved April 4, 1930 (Acts of 1930, page 1390) hereinafter referred to as "The Gasoline Tax Act of 1930," is constitutional and is not repugnant to the Commerce Clause of the Federal Constitution (Article 1, Section 8, Clause 3); and that the Court erred in not holding to the contrary, that the aforesaid Act is unconstitutional and is repugnant to said Commerce Clause of the Federal Constitution, in that it makes the interstate origin of the gasoline in question [fol. 37] the basis of classification in the imposition of the tax.

3

That the Court erred in holding that the aforesaid Gasoline Tax Act of 1930 passed as aforesaid by the General Assembly of the State of South Carolina, is constitutional and is not repugnant to the Commerce Clause of the Federal Constitution; and that the Court erred in not holding to the contrary, that said Act is unconstitutional and repugnant to the Commerce Clause of the Federal Constitution, inasmuch as it levies a tax on gasoline bought outright by plaintiff before its shipment in Interstate Commerce and not thereafter resold within this State.

4

That the Court erred in holding that the socalled Gasoline Tax Act of 1930 enacted as aforesaid by the General Assembly of South Carolina, is not a license tax Act.

5

That the Court erred in not holding that the Act in question is a License Tax Act, and that as a License Tax Act it is unconstitutional and is repugnant to the Commerce Clause of the Federal Constitution, because it makes both the act of storing the gasoline within the State of South Carolina and its importation in Interstate Commerce the joint acts which give rise to the license tax imposed; and that the Court further erred in not holding that a license tax cannot be laid in part upon Interstate Commerce.

6

That the Court erred in not holding that the aforesaid Gasoline Tax Act of 1930, enacted as aforesaid by the Gen- [fol. 38] eral Assembly of the State of South Carolina, is repugnant to both the Commerce Clause of the Federal Constitution and to the equal protection Clause of the Fourteenth Amendment to the Federal Constitution, in that it discriminates against gasoline produced by other States, and places the taxes levied only upon persons who and corporations which import in Interstate Commerce gasoline and store the same for twenty-four hours, it appearing affirmatively amongst other things that gasoline is produced and manufactured within the State of South Carolina, which said gasoline manufactured and produced within the State of South Carolina and stored for future use and consumption in South Carolina is exempt from the tax imposed under the said Gasoline Tax Act of 1930.

7

That the Court erred in not holding that under the undisputed facts of this case, plaintiff was entitled to an injunction against the imposition and enforcement of the threatened tax, there being no adequate remedy at law, and the admitted facts showing that the respondents were threatening to tax gasoline which had been definitely bought in a

sister State before its shipment and was not destined for resale, that such gasoline was a produc- of a sister state, and that such origin was made the basis of the classification for the purposes of such taxation.

8

That the Court erred in holding that in considering the constitutionality of the Act in question, that other Acts of the General Assembly of said State may be considered in so doing, and that said other acts may supplement and com- [fol. 39] plement the Constitutionality of the Act in question, it being submitted to the contrary that the Act in question must stand or fall as to its constitutionality upon its own terms, and that certainly no other Act which is not included within its terms may be read into said Act for the purpose of testing its constitutionality.

9

That the Court erred in holding that the general policy of the State of South Carolina as to the taxation of gasoline as a whole may be considered in testing the constitutionality of the Act in question, and that the fact that there is another Act or Acts which places a tax of six cents per gallon upon all persons, firms or corporations engaging in the business of selling gasoline may be invoked in testing the constitutionality of the present Act, which does not purport to tax sales but which attempts to tax importation in Interstate Commerce and storage alone.

10

That the Court erred in holding that the other Acts referred to in the Acts in question, to-wit: The Act of 1925, and the Act of 1929, purport to place a tax upon gasoline merely used within the State of South Carolina, and that the Standard Oil Company is legally forced and required to pay a gasoline tax within the State of South Carolina upon gasoline used by it in its fleet of trucks in said State; and that the payment of a uniform gasoline tax of six cents per gallon is by statute passed on to all users of gasoline within the State of South Carolina.

[fol. 40] —

That the Court erred in holding that the Acts of the State of South Carolina, taken as a whole, reach and tax all gas-

oline consumed in the State, it being submitted that the Act in question expressly leaves free of taxation gasoline used within twenty-four hours after its importation, which may be a considerable quantity, and that the Acts of 1925 and 1929 do not legally impose a tax on gasoline produced and used but not sold, in South Carolina.

12

That the Court erred in holding that the Act in question, namely, the Gasoline Tax Act of 1930, is not a license tax, which erroneous holding was the basis of its holding that said Act was not repugnant to Section 1, Article 10 of the Constitution of South Carolina, which provides that a license tax may be levied on "occupations and businesses alone"; it being submitted that the thing taxed herein was merely the owning and holding of one's own property which cannot be said to be either a business or an occupation, and that the Court erred in not holding the tax to be a license tax, and, therefore, repugnant to the aforesaid section of the State Constitution.

13

That the Court erred in not holding that the tax in question was not a property tax, and hence was repugnant to Section 1, Article 10 of the Constitution of South Carolina, which provides that "the General Assembly shall provide by law for a uniform and equal rate of assessment in taxation," and in not holding that for said reasons said tax was unconstitutional in that it levied a tax amounting to forty-eight per cent, whereas the property tax in force in [fol. 41] the County in question is but forty-seven mills on the dollar.

For which errors the plaintiff-petitioner and appellant prays that the decree and opinion of the Supreme Court of South Carolina dated and filed the 13th day of April, 1931, in the above entitled cause, be reversed, and that the cause be remanded with directions to said Court to grant the order of injunction sought; and for such other and further relief as may be proper in the premises.

P. F Henderson, Hendersons & Salley, Bomar & Osborne, Perrin & Tinsley, Haynesworth & Haynesworth, Appellant's Attorneys.

[fol. 42] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

NOTICE OF APPEAL WITH ACCEPTANCE OF SERVICE

To W. G. Query, J. P. Derham, and F. C. Robinson, personally and as members of South Carolina Tax Commission, or their attorneys:

Please to take notice that the plaintiff and peti-oner in the above entitled suit has appealed and does appeal to the Supreme Court of the United States from the decree and final order and judgment entered and granted by the Supreme Court of South Carolina on the 13th day of April, 1931, in so far as the same refuses to grant the permanent injunction sought by the plaintiff or petitioner herein, and in so far as the same grants final judgment against the plaintiff and in favor of the defendants herein.

Attached hereto are copies of the petition for appeal, order allowing appeal, assignment of errors, citation, and supersedeas and cost bond.

Dated at Aiken, S. Car., June 10, 1931.

P. F. Henderson, Hendersons & Salley, Bomar & [fol. 43] Osborne, Perrin & Tinsley, Haynesworth & Haynesworth, Counsel for Gregg Dyeing Company.

Acceptance of Service

Service of the notice of appeal, with papers attached, as listed in the above entitled cause, is hereby accepted this 11 day of June, 1931, for and in behalf of the defendants and Appellee's herein.

J. Fraser Lyon, John M. Daniel, Atty. Gen'l., Their Counsel.

[fols. 44 & 45] Bond on appeal for $1,250.00 approved; omitted in printing.

[fols. 46 & 47] Citation, in usual form, showing service on J. Fraser Lyon and John M. Daniel, omitted in printing.

[fol. 48] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

PRÆCIPE OF APPELLANT

The Clerk of the Supreme Court of South Carolina will please proceed to make up the transcript of record in the above entitled cause, including therein:

1. The whole of the printed transcript of record as used and submitted to the Supreme Court of South Carolina, the same being inclusive of the petition and complaint for injunction on the part of the plaintiff and petitioner, duly verified; the rule to show cause granted on July 12th, 1930, by Honorable Thomas P. Cothran, Associate Justice, the notice and demurrer on the part of the Defendant's, and three agreements and stipulations between counsel.

2. The opinion and final judgment of the Supreme Court of South Carolina, together with the dissenting opinion by Associate Justice Cothran.

3. Petition for appeal and supersedeas, and order granting the same, filed June —, 1931.

4. Assignment of errors, and petition for reversal, filed with petition for appeal.

5. Notice of appeal with acceptance of service thereof.

[fols. 49-54a] 6. Supersedeas and cost bond, with approval thereof.

7. Citation with acceptance of service.

8. This præcipe.

9. Designation of points relied on for reversal.

10. Clerk's certificate.

P. F. Henderson, Hendersons & Salley, Bomar & Osborne, Perrin & Tinsley, Haynesworth & Haynesworth, Plaintiff's-Appellant's Attorneys.

Due legal service of a copy of the foregoing præcipe is accepted this 11th day of June, 1931.

J. Fraser Lyon, John M. Daniel, Atty. Gen'l., As Attorneys for Defendants-Appellees.

[fol. 55] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 56] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED ON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed June 25, 1931

Counsel for the plaintiff in error or appellant herein designate as the points upon which they rely to reverse the judgment and final order of the Supreme Court of South Carolina which heard this cause, the points set out in the assignment of errors, (in which the same are more fully set out, all of which being relied upon), to-wit:

That the Supreme Court of South Carolina erred in making the decree herein, and in holding that the so-called Gasoline Tax Act of the State of South Carolina, approved April 4, 1930, (Acts of 1930, page 1390) is constitutional, and is not repugnant to the Commerce Clause of the Federal Constitution, and in not holding to the contrary that said Act is unconstitutional, and is repugnant to said Commerce Clause of the Federal Constitution, in that it makes the interstate origin of the gasoline in question the basis of classification in the imposition of the tax; and in that the Court erred in further holding that said Act is constitutional, and is not repugnant to said Commerce Clause of said Federal Constitution, and in not holding to the contrary that the Act is unconstitutional and repugnant to said [fol. 57] Commerce Clause of the said Federal Constitution inasmuch as it levies a tax on gasoline bought outright by plaintiff before its shipment in interstate commerce, and not thereafter resold within the State.

Further, in that said Court erred in holding that the Act in question is not a License Tax Act; and that said Court should have held that said Act was a License Tax Act, and as such is unconstitutional and repugnant to the Commerce Clause of the Federal Constitution, because it makes both the act of storing the gasoline in question within the State of South Carolina and its importation in interstate commerce the joint acts which give rise to the License Tax imposed; and that the Court erred in not holding that a License Tax cannot be laid in part on interstate commerce.

That the Court further erred in not holding that the Act in question is repugnant to both the Commerce Clause of the Federal Constitution and to the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution in that it discriminates against gasoline produced by other States and places the Tax levied only upon persons and corporations which import in interstate commerce gasoline, and store the same for twenty-four hours, it affirmatively appearing among other things that gasoline is produced and manufactured within South Carolina, which gasoline is not reached by the Act in question.

That the Court further erred in not holding that the plaintiff was entitled to an injunction, there being no adequate remedy at law open to the plaintiff, and that the respondents were threatening to collect a tax upon said gasoline brought in under the circumstances appearing in the admitted state of facts; and that the Court erred in consid- [fol. 58] ering and holding that upon passing upon the constitutionality of the Act in question that other Acts of the General Assembly of said State may be considered in so doing, and that the other Acts may supplement and complement the constitutionality of the Act in question. And that the terms of other Acts may be invoked in testing the constitutionality of the Act referred to, although said other Acts levy a tax only upon sales of gasoline, and do not attempt to tax importation in interstate commerce and storage alone.

That the Supreme Court of South Carolina further erred in holding that the Acts of 1925 and 1929, referred to by them, purport to place a tax upon gasoline merely used within the State of South Carolina, and in holding that the Standard Oil Company is legally forced and required to pay a gasoline tax in South Carolina upon gasoline used in its fleet of trucks in said State, and that the payment of a uniform gasoline tax of six cents per gallon is by Statute passed on to all users of gasoline within the State of South Carolina; and in holding that the Statutes of the State of South Carolina place a tax of all gasoline consumed in the State.

That the Supreme Court of South Carolina further erred in holding that the Act in question is not a License Tax Act, and based upon said erroneous holding in failing to

hold that said Act is unconstitutional under Section One, Article Ten of the Constitution of the State of South Carolina, which provides that a License Tax may be levied on "occupations and businesses alone," it appearing affirmatively that the plaintiff was not operating a storage business, but was only holding its own property until it could use it.

That the Supreme Court of South Carolina erred in not holding that the tax in question was in reality a property [fol. 59] tax, and hence was repugnant to Section One, Article Ten, of the Constitution of South Carolina, which provides that "the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation," and in not holding that the proposed proceeding lays a tax of forty-eight per cent on the gasoline in question, whereas the property tax in force in the County in which plaintiff owns a manufacturing plant is but forty-seven mills on the dollar.

And Appellant designates as the parts of the record which it thinks necessary for the consideration of this appeal the transcript of record before the Supreme Court of South Carolina, comprising the petition or complaint for injunction, duly verified, the rule to show cause executed by a Justice of the Supreme Court of South Carolina, the notice and demurrer on the part of the defendant, and three stipulations and agreements of counsel therein incorporated, and the decision and final judgment of the Supreme Court of South Carolina, rendered and filed on April 13, 1931, the petition for appeal and supersedeas and order granting the same, the assignment of errors and petition for reversal with petition for appeal, the notice of appeal, the supersedeas and cost bond with approval thereof, the citation, the præcipe, this designation of points relied on for reversal, and designation of parts of the record to be printed, together with acceptance of service on all of said papers, and the Clerk's Certificate.

P. F. Henderson, Hendersons & Salley, Bomar & Osborne, Perrin & Tinsley, Haynesworth & Haynesworth, Appellant's Attorneys.

Due legal service of a copy of the foregoing designation [fols. 60 & 61] of points relied on for reversal, and all parts

of record necessary to the consideration of the appeal, is hereby accepted.

John M. Daniel, Atty. Gen'l; J. Fraser Lyon, Appellees' Attorneys.

[fol. 62] [File endorsement omitted.]

Endorsed on cover: File No. 35,984. South Carolina Supreme Court. Term No. 170. Gregg Dyeing Company, appellant, vs. W. G. Query, J. P. Derham, and F. C. Robinson, personally and as members of South Carolina Tax Commission. Filed June 20, 1931. File No. 35,984.

IN SUPREME COURT OF THE UNITED STATES

STIPULATION AND ADDITION TO RECORD—Filed Oct. 29, 1931

IN SUPREME COURT OF SOUTH CAROLINA

GREGG DYEING COMPANY, Appellant,

vs.

W. G. QUERY et al., Respondents

CERTIFICATE

I, J. B. Westbrook, Clerk of the Supreme Court of South Carolina, do certify that the attached printed sheet which is identified by my signature, is a true and correct copy of a stipulation of counsel which was added to and comprised a portion of the record which was before the Supreme Court of South Carolina upon the argument and trial of the above entitled cause in said Court.

Given under my hand and seal of the Supreme Court of South Carolina, this 27th day of October, 1931.

J. B. Westbrook, Clerk of Supreme Court of South Carolina. (Seal Supreme Court of South Carolina.)

STIPULATION OF COUNSEL

It is agreed that the following facts stand as admitted and as if they were alleged in the complaint, and that the Supreme Court of South Carolina be requested to consider them in passing upon the issues herein; namely:

"That much of the gasoline produced by the Standard Oil Company in its refinery referred to in the complaint and much gasoline which is brought into the State by the Oil Companies for re-sale, is actually stored within the State for more than twenty-four hours before it is sold or used, and is not taxed for its importation and/or storage in this State, but is taxed when it is sold or used in this State by such Oil Companies. That such gasoline produced in the refinery of the Standard Oil Company referred to in the

complaint, as is shipped to other states than South Carolina, is not taxed in South Carolina."

We consent:

Haynsworth & Haynsworth, Bomar & Osborne, Perrin & Tinsley, Hendersons & Salley, Plaintiff's Attorneys. J. Fraser Lyon, Defendants' Attorneys.

A true copy.

J. B. Westbrook, Clerk Supreme Court of South Carolina. (Seal Supreme Court of South Carolina.)

[File endorsement omitted.]

CLERK'S COP

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 245

THE CITY OF GREENVILLE, ETC., ET AL., APPELLANTS,

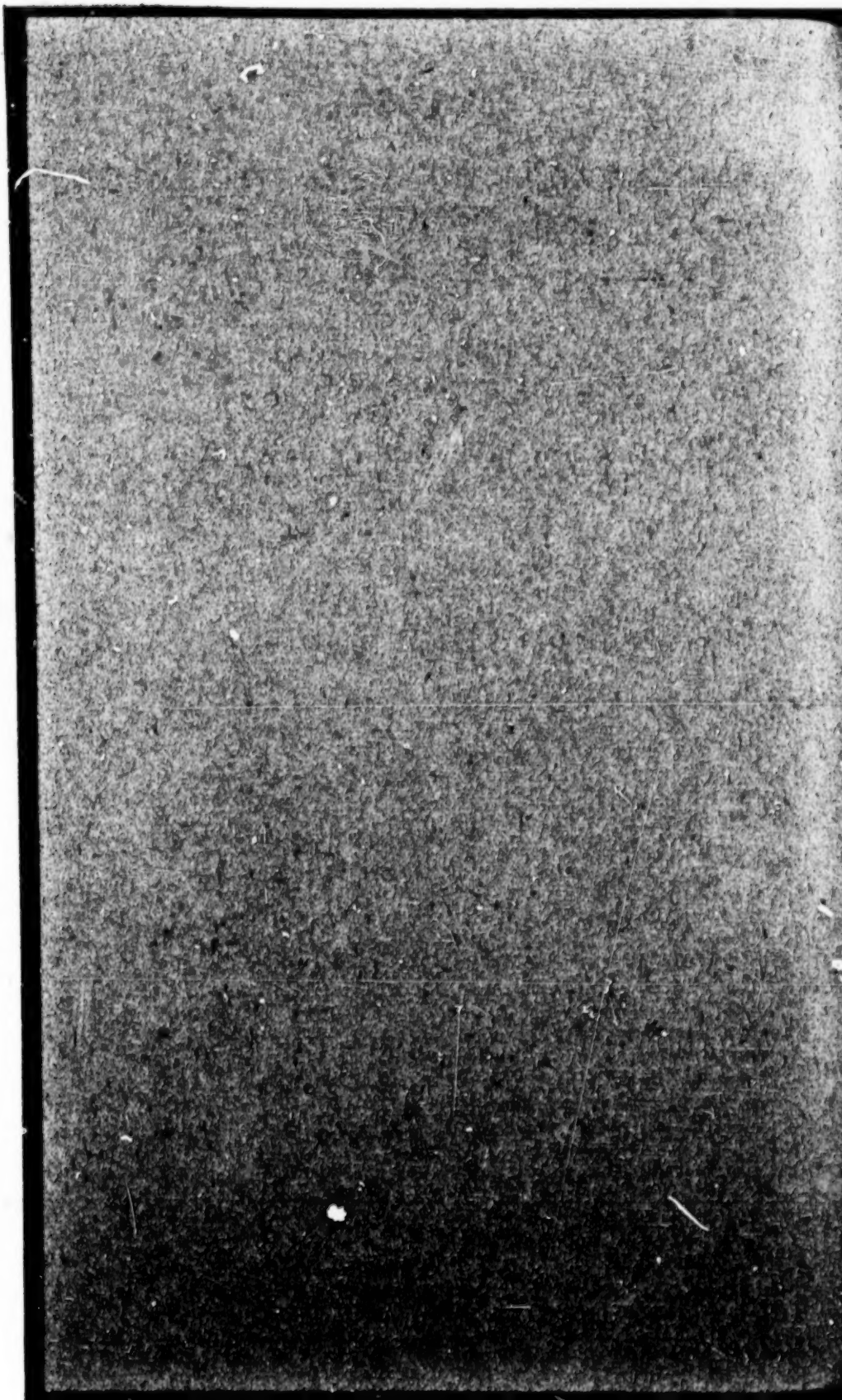
vs.

W. G. QUERY, J. P. DERHAM, AND FRANK C. ROBINSON, CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF SOUTH CAROLINA

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

FILED JULY 20, 1931

(36,059)



(36,059)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 245

THE CITY OF GREENVILLE, ETC., ET AL., APPELLANTS,

vs.

W. G. QUERY, J. P. DERHAM, AND FRANK C. ROBINSON, CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF SOUTH CAROLINA

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 28, 1931

[fols. 1 & 2]

IN SUPREME COURT OF SOUTH CAROLINA

In the Original Jurisdiction

THE CITY OF GREENVILLE, a Municipal Corporation under the Laws of the State of South Carolina; the City of Sumter, a Municipal Corporation under the Laws of the State of South Carolina; the City of Florence, a Municipal Corporation under the Laws of South Carolina, and the County of Sumter, a Municipal Corporation under the Laws of the State of South Carolina, Plaintiffs,

against

W. G. QUERY, J. P. DERHAM, and FRANK C. ROBINSON, Constituting the State Tax Commission of the State of South Carolina, Defendants

[fol. 3] COMPLAINT—June 27, 1930

The plaintiffs above named, complaining of the defendants, allege:

1st. That at all times herein mentioned the plaintiffs, the cities of Greenville, Sumter, and Florence, and the County of Sumter, were, and still are, municipal corporations duly created and existing under and by virtue of the laws of the State of South Carolina, and as such they bring this action in their own behalf and in behalf of all other municipalities, and counties within the State of South Carolina in like situation which may come in and contribute to the expense hereof.

2nd. That the defendants, W. G. Query, J. P. Derham and Frank C. Robinson are the duly elected, qualified and acting members of the State Tax Commission of the State of South Carolina, and as such are the proper persons against whom this action should be brought.

3rd. That the General Assembly of the State of South Carolina at its 1930 session passed an Act entitled "An act to impose a license tax on gasoline, substitutes there-

for, or combinations therefor, kept, stored or used in the State of South Carolina, which have not been subjected to the payment of a license tax under any other statute of the State of South Carolina, and providing for the collection and distribution of such tax," which said act was approved by the Governor of the State of South Carolina on the 4th [fol. 4] day of April, 1930, a copy of said Act being hereto attached and made a part hereof as Exhibit "A".

4th. That the plaintiffs above named, and, as they are informed and believe, others in like situation, have for some time prior to the passage of the said Act, purchased gasoline and motor fuels without the State of South Carolina in tank car lots and have imported the same within this State and have stored thereafter, used and consumed the said gasoline and motor fuels for public purposes in connection with the discharge of the functions devolving upon them as municipal corporations under the laws of the State of South Carolina, and that the said municipalities have not been engaged in the handling of gasoline as a business or occupation, have not derived any revenue therefrom, the said gasoline being purchased, imported, stored and used solely for municipal purposes as aforesaid.

5th. That under the terms of the Act hereinbefore referred to, if the said Act be constitutional, the plaintiffs, and all others in like situations, will be compelled to pay a tax purporting to be a license tax upon the storage and use of said gasoline for strictly municipal purposes.

6th. The plaintiffs allege that the said Act approved the 4th day of April, 1930, is contrary to the provisions of the Constitution of the United States and of the State of South Carolina and should be declared null and void, in that

(a) The said Act, insofar as it undertakes to levy a tax on property of the plaintiffs and other municipalities and political subdivisions in the State of South Carolina, violates Section 4 of Article 10 of the Constitution of South [fol. 5] Carolina, whereby the property of counties and municipalities used exclusively for public purposes and not for revenue is exempt from taxation.

(b) That the General Assembly of the State of South Carolina is limited in its taxing power by the provisions

contained in Section 1 of Article 10 of the Constitution of South Carolina to the imposition of a tax upon property, a capitation tax upon domestic animals, a graduated tax on incomes and a graduated license on occupations and business, and that the tax undertaken to be imposed by the terms of the said Act approved April 4, 1930, purports to be a license tax, but that the said tax is not applicable to the storage and consumption of gasoline and motor fuels by municipalities for public purposes and not for revenue, in that the said storage and consumption thereof for such purposes does not constitute an occupation or a business.

(c) That the said tax is in violation of the provisions of Section 1, Article 10 of the Constitution of the South of South Carolina, in that it does not provide for a uniform and equal rate of assessment and taxation, in that it permits gasoline to be imported and used without taxation, provided the same can be used within 24 hours after such shipment loses its interstate character, and that it is likewise discriminatory, in that it exempts from the operation thereof gasoline which is imported and stored for resale.

(d) That the said Act approved April 4, 1930, is violative of subdivision 3 of Section 8 of Article 1 of the Constitution of the United States, in that there is thereby dele- [fol. 6] gated to the Congress of the United States the power to regulate commerce between the several states, and the Act approved April 4, 1930, is an attempt on the part of the State of South Carolina to regulate such interstate commerce and to impose a burden thereupon.

7th. The plaintiffs allege that they have no adequate remedy at law, in that no provision is made in said Act for the recovery of any tax illegally charged and collected, and in that the several municipalities and counties affected would in any event be driven to a multiplicity of suits, and plaintiffs further allege that this action is properly maintainable in the original equity jurisdiction of this Honorable Court, in that a matter of general public interest *in* involved, affecting municipalities and counties of this State, and for the reason that an emergency exists, in that the tax imposed by the Act in question is due and payable monthly, that some of said taxes have already accrued and that the de-

fendant may at any time proceed to undertake to enforce the collection thereof and that this Court should exercise its jurisdiction to restrain the imposition and collection of said tax.

Wherefore plaintiffs pray:

1st. That a Rule may issue requiring the defendants to show cause why they should not be restrained and enjoined from enforcing the collection of the tax as against these plaintiffs during the pendency of this action, and

2nd. That a Rule may issue requiring the defendants, constituting the State Tax Commission of South Carolina, to show cause why they should not be permanently restrained and enjoined from enforcing the provisions of the Act approved April 4, 1930, and

[fol. 7] 3rd. That the said Act, insofar as it applies to municipalities, counties, or political subdivisions of the State of South Carolina, *de* declared unconstitutional, null and void.

B. A. Morgan, Attorney for the City of Greenville, South Carolina. Shepard K. Nash, Attorney for the City and County of Sumter, South Carolina. J. M. Lynch, Attorney for the City of Florence, South Carolina.

Duly sworn to by A. C. Mann. Jurat omitted in printing.

[fol. 8] In Supreme Court of South Carolina

Rule to Show Cause—July 3, 1930

Upon considering the verified petition of the plaintiff, herein, and it appearing to the Court that public interests are involved in this proceeding, and that this case should be determined by the Court in its original jurisdiction,

It is ordered, That W. G. Query, J. P. Derham, and Frank C. Robinson, constituting the State Tax Commission of the State of South Carolina, in open court at Columbia, S. C., on the first day of the term next after the expiration of the time fixed in the summons, at 10:00 A. M., or as soon

thereafter as suits the convenience of the Court for the hearing of the issues in this proceeding, do show cause [fols. 9-12] before the Supreme Court of South Carolina, if any they can why the prayer of the complaint should not be granted, and why the defendants W. G. Query, J. P. Derham, and Frank C. Robinson, constituting the State Tax Commission of the State of South Carolina, should not be enjoined from carrying out the provisions of an Act entitled "An Act to impose a license tax on gasoline, substitutes therefor, or combinations thereof, kept, stored or used in the State of South Carolina, which have not been subjected to the payment of a license tax under any other statute of the State of South Carolina, and providing for the collection and distribution of such tax," which said Act was approved by the Governor of the State of South Carolina on the 4th day of April, 1930, and that they shall show warrant, if any they can, for executing the provisions of said Act under the constitution and laws of the State of South Carolina. That, in the meantime, the defendants be and are hereby restrained from enforcing said Act.

It is further ordered, that a copy of the summons and complaint, and Rule to Show Cause be forthwith served on the defendants, and that a copy of the return be served upon the attorneys for the plaintiff, herein, within the time fixed in the summons in this cause for making answer to the complaint.

T. P. Cothran, Associate Justice.

[fol. 13] EXHIBIT "A" TO COMPLAINT

An Act to impose a license tax on gasoline, substitutes therefor, or combinations thereof, kept, stored or used in the State of South Carolina, which have not been subjected to the payment of a license tax under any other statute of the State of South Carolina, and providing for the collection and distribution of such tax

Section 1. Be it enacted by the General Assembly of the State of South Carolina: Every person, firm corporation, municipality, County, or any subdivision thereof, in the State of South Carolina which shall import into this State from any other State or foreign Country, or shall receive

by any means into this State, and keep in storage in this State for a period of twenty-four hours or more, after the same shall have lost its interstate character as a shipment in interstate commerce, any gasoline or any other like products of petroleum or under whatever name designated, which is intended to be stored or used for consumption in this State, shall pay a license tax of six cents per gallon for every gallon of gasoline, or other like products of petroleum aforementioned, which shall have been shipped or imported into this State from any other State or foreign country, and which shall hereafter, for a period of twenty-four hours after it loses its interstate character as a shipment of interstate commerce be kept in storage in this State to be used and consumed in this State by any person, firm, or corporation, municipality, county or subdivisions thereof, and which has not already been subjected to the payment of the license taxes imposed upon the sale thereof by acts of the General Assembly of the State of South Carolina, the same being Act, No. 34, Acts of 1925, approved the 23rd day of March, 1925, and Act No. 102, Acts of 1929, approved the 16th day of March, 1929, imposing license taxes for the privilege of dealing in gasoline or other like products or petroleum; Provided, That this Act shall not impose a tax upon crude petroleum, residium or smudge oil, Provided, further, That one percent to cover loss by evaporation, spillage or otherwise shall be deducted by the taxpayer when remitting the tax required by this Act.

Section 2. The license tax imposed by this act shall be paid on or before the 20th day of each month and every [fol. 14] month, as hereinafter provided. That every person, firm, corporation, municipality, county or any subdivision thereof subject to the payment of the tax herein provided shall on or before the 20th day of each month and every month, make out and file with the South Carolina Tax Commission a return under oath, in such form as may be prescribed by said South Carolina Tax Commission showing the number of gallons of gasoline, combination thereof or substitutes therefor, which have been received, kept, stored or used within this State during the previous month and shall at the same time remit to the South Carolina Tax Commission the amount of the tax im-

posed by this Act. Every one liable for the payment of this tax shall keep a record, or records, showing all receipts of all gasoline, combination thereof or substitutes therefor, and such records shall be at all times subject to inspection by any agent of the South Carolina Tax Commission or the Department of Agriculture, Commerce and Industries.

Section 3. If the tax imposed in this Act is not paid to the South Carolina Tax Commission on or before the 25th day of each and every month the tax Commission shall issue a warrant or execution directed to the Sheriff of the County or the tax collector in which the delinquent taxpayer resides or where such business is conducted, and the Sheriff or tax collector to whom this execution is directed shall proceed to enforce the same in the same manner provided by law for the enforcement of an execution issued by the County Treasurer against a delinquent taxpayer. The taxes and all penalties herein provided shall be held as a debt payable to the State by the taxpayer against whom the same shall be charged, and all such taxes and penalties shall be a first lien in all cases whatsoever upon all property of the taxpayer charged therewith.

Section 4. If any taxpayer liable for the payment of the tax herein imposed shall fail to make the required monthly returns or shall fail to pay the taxes herein provided the South Carolina Tax Commission shall make a return for such delinquent taxpayer upon such information as may be reasonably obtained, assess the tax thereon, add a penalty of ten percent to the amount as assessed and proceed to collect the tax and penalties as provided for in Section 3 of this Act.

Section 5. Every taxpayer liable for the payment of the tax herein imposed by this Act shall report to the South Carolina Tax Commission within five (5) days after the [fol. 15] date this Act goes into effect, a true statement of all gasoline, combinations thereof, or substitutes therefor, which such taxpayer has had on hand at the close of the day this Act shall go into effect.

Section 6. Nothing within this Act shall be construed to impose a license tax upon any selling agent, consumer, or

retailer, selling, consigning, shipping, distributing or using gasoline, combinations, thereof, or substitutes therefor, which may have been bought from any oil company on which the license taxes imposed by Act No. 34, Acts of the General Assembly of 1925, approved the 23rd of March, 1925, and Act No. 102, Acts of the General Assembly of 1929, approved the 16th day of March, 1929, have been paid nor shall this Act be construed as applying in the case of interstate commerce.

Section 7. The Commission of Agriculture, Commerce and Industries shall, at such times and in such form as may be specified by the South Carolina Tax Commission certify to the South Carolina Tax Commission the same information regarding shipment of gasoline to taxpayers liable for the payment of the tax imposed in this Act as is done under the provisions of Act No. 34, Acts of 1925, and Act No. 102, Acts of 1929.

Section 8. The tax imposed in this Act shall be distributed in the same manner and proportion as is the tax imposed by Act No. 102, Acts of 1929. Nothing in this Act shall be construed so as to apply to crude oil, fuel oil or kerosene oil.

Section 9. If any clause, sentence, section or provision of this Act shall be held unconstitutional such invalidity shall not effect or impair the remaining portion of this Act.

Section 10. This Act shall take effect immediately upon its approval by the Governor.

Approved April 4th, 1930.

[fol. 16] In Supreme Court of South Carolina

[Title omitted]

Notice and Demurrer

To Messrs. B. A. Morgan, Shepard K. Nash, and J. M. Lynch, attorneys for plaintiffs:

You will please take notice that upon the call of this case for trial, defendants will interpose the following demurrer to the complaint:

The defendants above named demur to the complaint herein upon the ground that it fails to state facts sufficient to constitute a cause of action;

In that it appears that the taxes sought to be collected by defendants in the discharge of their official duties are imposed by the terms of an Act approved April 4th, 1930, and that no part of said Act violates the clauses of the Constitution of the United States, nor of the State of South Carolina, as alleged in the complaint.

John M. Daniel, Attorney General for S. C. J. Fraser Lyon, General Counsel for Defendants.

I hereby certify that the above demurrer is meritorious and not interposed merely for delay.

J. Fraser Lyon, J. Fraser Lyon.

[fol. 17] In Supreme Court of South Carolina

[Title omitted]

Agreed Statement of Facts

In addition to the allegations contained in the complaint, the following facts are agreed to:

That much gasoline is manufactured by the Standard Oil Company at its refinery in Charleston, in the State of South Carolina, which said gasoline is stored for future use in the State of South Carolina, and much gasoline is brought into the State by the Oil Companies for re-sale and is actually stored within this State for future use for more than twenty-four hours before it is sold or used, and none of this gasoline is taxed for its importation and/or storage in this State, but is taxed under the "Gasoline Business License Act" when it is used in this State by such Oil Company, or when sold in less than tank car lots by such oil companies.

That such gasoline as is manufactured at the refinery of the Standard Oil Company in Charleston, S. C., as is shipped to other States than South Carolina, is not taxed in South Carolina.

Also under the provisions of the law, when any Oil Com-
[fol. 18] pany sells a tank car lot of gasoline to a dealer in

South Carolina, the dealer pays the tax on such gasoline as it is consumed and as it is resold.

James M. Lynch, Florence, S. C.; B. A. Morgan, Greenville, S. C.; Shepard K. Nash, Sumter, S. C., Plaintiffs' Attorneys. J. Fraser Lyon, Columbia, S. C., Defendant's Attorney.

[fol. 19] In Supreme Court of South Carolina

In the Original Jurisdiction

Case No. 955

The City of Greenville, a Municipal Corporation, et al., Plaintiffs,

v.

W. G. Query et al., Constituting the State Tax Commission of the State of South Carolina, Defendants

Complaint Dismissed and Injunction Dissolved

James M. Lynch, of Florence; Shepard K. Nash, of Sumter, and B. A. Morgan, of Greenville, for plaintiffs.
J. Fraser Lyon, of Columbia, for defendants.

Opinion No. 13117—Filed April 13, 1931

John I. Cosgrove, A. A. J.:

By this action in the original jurisdiction of the Court, the Cities of Greenville, Sumter and Florence (the County of Sumter later intervening) seek to enjoin the enforcement of the Act of the General Assembly (Act No. 833) Approved 4th April, 1930, popularly termed the Gasoline Tax Act of 1930, praying that said Act "insofar as it applies to municipalities, counties, or political subdivisions of the State of South Carolina, be declared unconstitutional, null and void".

The complaint alleges, in substance, that plaintiffs and others in like plight for some time prior to the passage of this Act purchased gasoline and motor fuels without the State of South Carolina and imported the same in tank car lots, and have stored, used and consumed such imported

gasoline and motor fuels "for public purposes in connection with the discharge of the functions devolving upon them as municipal corporations under the laws of the State of South Carolina"; and, in addition, that they are not engaged in the handling of gasoline as a business or occupation and have derived no revenue therefrom, the gasoline so imported being stored and used solely for municipal purposes; and further, that if the Act is upheld, plaintiffs will be compelled to pay a tax upon the storage and use of gasoline for strictly municipal purposes.

They assail the Act as violative of both the Federal and State Constitutions.

It is asserted that the Act is unconstitutional under the Federal Constitution because it attempts to regulate interstate commerce and to impose a burden thereupon.

Under the State Constitution, its invalidity is urged under three heads: (1) That the tax is not such a tax as the General Assembly has the power to impose, in that, (a) It is a license tax imposed on a business or occupation, and as such cannot be made applicable to municipal corporations storing and using gasoline for governmental pur- [fol. 20] poses, (b) It is a tax on the mere ownership of property and the alleged inherent right to use the same free from governmental interference; (2) The tax is not uniform and equal; and (3) The Act attempts to levy a tax on the property of municipalities and counties contrary to Section 4, Article X, of the Constitution.

All of the objections to this statute above presented (with the exception of ground (3) were fully considered and decided against plaintiff's contentions in Gregg Dyeing Company v. Query et al., the opinion in which will be filed herewith.

There remains, then, for consideration in this cause only the objection that the Act is violative of the Constitution, Section 4, Article X, in that it imposes a tax on the property of a municipality or county, exempt by law.

Section 4, Article X, of the Constitution provides:

"There shall be exempt from taxation all county, township, and municipal property used exclusively for public purposes."

Plaintiffs claim that property of political subdivisions, used for public purposes, are exempt from all duties or

taxes of whatever nature or description; that the policy of this State is for a liberal construction of the exemption from taxation allowed municipal corporations; and that the Act taxes instrumentalities of government and impedes and burdens the exercise of governmental functions.

It is true that in the absence of express declaration by the Legislature, there is a presumption, generally, against the intention of the legislative body to tax an instrumentality of state government or a state agency; and that where an exemption from taxation of its property is claimed by such instrumentality or agency, a liberal construction of the exemption will be allowed by this Court (State v. Columbia, 115 S. C. 108; 104 S. E. 337). But in the instant case, the taxing body of South Carolina has expressly and clearly enacted that all municipalities, counties and political subdivisions shall pay this tax. Rules of presumption and policy, therefore, disappear in the light of expressed legislative declaration.

We have just held in the Gregg case, supra, that this tax is not a tax on property at all; but that it is an excise imposed on the storage of gasoline in South Carolina for use and consumption in this State. Does, then, the Constitutional exemption claimed by plaintiffs, as municipal corporations, extend to excise taxes as well as property taxes?

In South Carolina, taxes generally may be grouped into two classes; ad valorem taxes on property and taxes on privileges, excises, licenses, franchises and other classifications of like kind.

A study of Article X of our Constitution, entitled "Taxation and Finance", convinces us that the framers of that instrument in this Article were dealing solely with ad valorem taxes on property. (See Gregg Dyeing Co. v. Query et al., supra; City of Louisville v. Cromwell, (Ky.) 27 S. W. (2nd) 377.)

As was pointed out in that case, and in other decisions of this Court, there is no inhibition in our Constitution on the power of the General Assembly to impose excise taxes. As the provisions of Article X deal only with ad valorem taxes on property (and, in addition, with license taxes on occupa-[fol. 21] tions and businesses, income taxes and others expressly thereon named), it would seem logically to follow that the exemptions provided for in that Article would apply only to the kinds of taxes therein dealt with and

regulated. As neither this provision of the Constitution, nor any other, in any way refer to excise taxes, we hold that the exemptions therein allowed cannot be claimed against such taxes. In this conclusion we are not without support from eminent authority.

In 26 R. C. L. p. 315, we find:

"An exemption from taxation applies primarily to the annual general property tax. Whether it is to be extended to other classes of taxes depends upon various circumstances. Thus it does not ordinarily apply to excises, especially to such as are not in lieu of property taxes but are imposed upon the enjoyment of a privilege."

Churches and similar institutions, likewise exempted under this Article, have been denied by this Court exemption from liability for street improvement assessments. (Wesley M. E. Church v. Columbia 105 S. C. 303).

In addition, our conclusion is sustained by an almost unanimous line of contemporaneous authorities upholding a tax of this character against like objections of municipal corporations and governmental subdivisions.

Crockett v. Salt Lake County (Utah), 270 Pac. 142; 60 A. L. R. 867.

Wright v. Fulton County (Ga.), 150 S. E. 262.

City of Louisville v. Cromwell (Ky.), 27 S. W. (2nd) 377.

City of West Palm Beach (Fla.), 130 So. 710.

City of Portland v. Kozer (Ore.), 217 Pac. 833.

People v. City and County of Denver (Colo.), 272 Pac. 629.

Plaintiffs cite and rely upon the case of O'Berry v. Mecklenburg County, 151 S. E. 880; 67 A. L. R. 1304, in which a like statute of North Carolina was held not to apply to counties of that state. In this case it is worthy of note that the tax in question was defined by the North Carolina Supreme Court to be an excise tax. That court, however, expressly refused to pass on the Constitutional question involved. Its decision was merely that the terms and provisions of the Act there under consideration were not broad enough to include a county, there being an absence of express declaration of intention so to do. It is, therefore, of no application in the instant case, in which our statute ex-

pressly imposes the tax on the municipal corporations affected.

The other case relied on by plaintiffs is Panhandle Oil Co. v. Miss. 277 U. S. 218, 72 L. Ed. 857. In this case, the Supreme Court of the United States held, in effect, that the sales tax on gasoline imposed by the Mississippi statute was a consumption tax paid by the consumer, and as such could not be assessed and collected on purchases of gasoline by the United States in the exercise of its constitutional powers. This conclusion was supported by a bare majority of one of that Court.

We, of course, are not bound by that decision on this point. We prefer, however, the view of Mr. Justice Holmes, who dissented from the conclusion of the majority that such a tax is a burden on the exercise of governmental functions and as tax on a governmental instrumentality. He said:

"I am not aware that the President, the Members of Congress, the Judiciary or, to come nearer to the case in hand, [fol. 22] the Coast Guard or the officials of the Veterans' Hospital, because they are instrumentalities of government and cannot function naked and unfed, hitherto have been held entitled to have their bills for food and clothing cut down so far as their butchers and tailors have been taxed on their sales; and I had not supposed that the butchers and tailors could omit from their tax returns all receipts from the large class of customers to which I have referred. The question of interference with Government, I repeat, is one of reasonableness and degree and it seems to me that the interference in this case is too remote. Metcalf v. Mitchell, 269 U. S. 514, 70 L. Ed. 384, 46 Sup. Ct. Rep. 172."

A like argument was satisfactorily disposed of in City of Louisville v. Cromwell, supra, in this language:

"Under the condition of the law as thus declared, it would seem superfluous to discuss the opinions of courts in other jurisdictions, either state or federal, since the law as declared in this jurisdiction leads inevitably to the conclusion that plaintiff is not entitled to the exemption it claims. If it were otherwise, then the city would be exempt from paying the tax levied by statute upon the filing of suits on amounts above $50, and would also be exempt from paying the appeal tax fee collected on appeals to this court. It would likewise be exempt from paying any inheritance,

legacy, or succession tax that might be levied in cases when some patriotic citzen should devise it property, and the same would be true as to the enhanced price put upon commodities by dealers therein in order to recoup the amount of occupational or excise taxes that they have been required to pay. The same logic urged in support of plaintiff's claimed exemption would also entitle it to claim exemption from paying the enhanced value of any article it might purchase in the discharge of its governmental function and which enhancement was because of general ad valorem taxes that the person or dealer from whom the purchase was made may have placed on the selling price, and the principle so contended for would thus produce, in the attempted enforcement of the exemption, such entangled and confused conditions as to be practically incapable of enforcement and which it might be well presumed that the Legislature never intended to create."

Again, from the same case:

"It also should not be overlooked that the involved tax is levied and collected solely by and for the benefit of the commonwealth and not by any municipality or other subdivision of the state. The proceeds go to make up the principal part of a fund to meet a supremely necessary purpose of modern creation, i. e., the construction and maintenance of roads of sufficient capacity to meet the requirements and necessities of modern vehicles of travel. The statute is so devised as to distribute the burden of contributing to that fund in the most equitable and just manner possible. The roads are built and maintained for the use of the vehicles that consume the gasoline. The larger and heavier ones consume more of the taxed product than the lighter ones, and the heavier the vehicle the more damage it does to the roads and the greater the necessity for their increased substantiality. So that every one contributes in proportion to his use of the roads and in proportion to the corresponding damage done to them by such use. Counties, municipalities and other taxing districts use them in the manner indicated the same as private individuals, and the involved tax is expended to enable the state to construct and maintain them for the use of such municipal authorities as much so as is done for the private citizen."

These gasoline taxes have been pledged to the payment of the principal and interest on bonds, the proceeds of which [fol. 23] were used and are being used in the construction and maintenance of the highways of this state. Millions of dollars of bonds have been issued and will be issued for these purposes. Good faith with the holders of these bonds would seem to require that no device should be countenanced which would permit evasion of the taxes so pledged, unless the Act imposing them is clearly unconstitutional beyond a reasonable doubt. We are not so convinced.

It is therefore ordered that the temporary injunction herein is dissolved, the prayer for a permanent injunction denied, and the complaint and intervening petition dismissed.

Blease, C. J.; Stabler and Carter, J. J., concur. Cothran, J., dissents.

In Supreme Court of South Carolina

Dissenting Opinion

Cothan, J. (dissenting):

For the reasons stated by me, dissenting in the case of Gregg Dyeing Company v. Query, et al., I think that the Act of 1930 is unconstitutional and that the injunction prayed for should be granted.

[fol. 24] In Supreme Court of South Carolina

[Title omitted]

Petition for Appeal and Supersedeas

To the Honorable Eugene S. Blease, Chief Justice of the Supreme Court of South Carolina:

And now comes the City of Greenville, a Municipal Corporation under the Laws of the State of South Carolina, the City of Sumter, a Municipal Corporation under the Laws of the State of South Carolina, the City of Florence, a Municipal Corporation under the Laws of the State of

South Carolina, and the County of Sumter, a Municipal Corporation under the Laws of the State of South Carolina, the plaintiffs and petitioners herein, by P. F. Henderson, B. A. Morgan, Shepard K. Nash and James M. Lynch, their attorneys, and feeling aggrieved by the opinion and order of this Court, entered on the 13th day of April, 1931, in so far as the same refused to grant the permanent injunction prayed for in plaintiffs and petitioners complaint herein, and in that said opinion and order granted a final judgment against these plaintiffs and hereby pray that an appeal may be allowed them from said opinion, decree and final order to the Supreme Court of the United States, and that the Clerk of the Supreme Court of South Carolina may be directed to prepare and certify a transcript of the records and proceedings in said cause to the [fol. 25] United States Supreme Court at Washington, D. C., in accordance with its rules and practice, and for the reasons specified and set out in the assignment of errors filed herewith, in order that the errors complained of in the said assignment of errors may be reviewed, and if error be found, corrected according to the laws and customs of the United States, and that all further proceedings herein after the allowance of said appeal be transferred to said Supreme Court of the United States of America.

Petitioners further pray that an order of supersedeas may be granted herein pending the final disposition of the cause, and that the amount of the security therefor, and for costs, be fixed by the order allowing this appeal.

The City of Greenville, the City of Sumter, the County of Sumter, the City of Florence, by P. F. Henderson, B. A. Morgan, Shephard K. Nash, James M. Lynch, Their Counsel.

[fol. 26] In Supreme Court of South Carolina

[Title omitted]

Order Allowing Appeal and to Operate as Supersedeas—July 8, 1931

The plaintiffs and petitioners herein having prayed for the allowance of an appeal to the Supreme Court of the

United States from the decree made and the final judgment entered in said cause by the Supreme Court of the State of South Carolina on the 13th day of April, 1931, in so far as the same refused the issuance of an injunction against the defendants, and in so far as the same granted absolute judgment against the plaintiffs, all against the prayer of the plaintiffs in their complaint herein, and having presented and filed their petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided, it is now hereby

Ordered

That an appeal be and the same is hereby allowed as prayed for to the Supreme Court of the United States in this cause, and as provided by law; and

It is further ordered that the Clerk of this Court shall prepare and certify a transcript of its record and proceeding, and decree and final order, in accordance with the stat-
[fol. 27] utes and rules of the Supreme Court of the United States, and transmit the same to the Clerk of the Supreme Court of the United States in Washington, D. C., so that he shall have the same in said Court within thirty days from this date; and

It is further ordered that this order operate as a supersedeas, and that the supersedeas bond be and the same is fixed in the sum of One Thousand ($1000.00) Dollars, and

It is further ordered that the security for costs be and the same is hereby fixed in the sum of Two Hundred fifty Dollars (-250.00).

Let said bond, which may be combined in the sum of Twelve hundred fifty ($1250.00) Dollars, be approved by the Clerk of this Court.

Eugene S. Blease, Chief Justice of Supreme Court of South Carolina.

[fol. 28] In Supreme Court of South Carolina

[Title omitted]

Assignment of Errors

And now come the City of Greenville, a Municipal Corporation under the Laws of the State of South Carolina, the City of Sumter, a Municipal Corporation under the Laws of

the State of South Carolina, the City of Florence, a Municipal Corporation under the Laws of the State of South Carolina, and the County of Sumter, a Municipal Corporation under the Laws of the State of South Carolina, the plaintiffs and petitioners herein, through their counsel, and present this assignment of errors, and say that in the records and proceedings in the above entitled cause and the resultant decree and opinion of the Supreme Court of South Carolina made and entered against them on the 13th day of April, 1931, there is error in the particulars herein set out; that is to say:

1

That the Court erred in making the decree herein.

2

That the Court erred in holding that the Act of the General Assembly of the State of South Carolina approved April 4, 1930 (Acts of 1930, page 1390) hereinafter referred to as "The Gasoline Tax Act of 1930," is constitutional and is not repugnant to the Commerce Clause of the Federal Constitution (Article 1) Section 3, Clause 3); and that the Court erred in not holding to the contrary, that the aforesaid Act is unconstitutional and is repugnant to said Commerce Clause of the Federal Constitution, in that it makes [fol. 29] the interstate origin of the gasoline in question the basis of classification in the imposition of the tax.

3

That the Court erred in holding that the aforesaid Gasoline Tax Act of 1930 passed as aforesaid by the General Assembly of the State of South Carolina, is constitutional and is not repugnant to the Commerce Clause of the Federal Constitution; and that the Court erred in not holding to the contrary, that said Act is unconstitutional and repugnant to the Commerce Clause of the Federal Constitution, inasmuch as it levies a tax on gasoline bought outright by plaintiffs before its shipment in Interstate Commerce and not thereafter resold within this State.

4

That the Court erred in holding that the socalled Gasoline Tax Act of 1930 enacted as aforesaid by the General Assembly of South Carolina, is not a license tax Act.

5

That the Court erred in not holding that the Act in question is a License Tax Act, and that as a License Tax Act it is unconstitutional and is repugnant to the Commerce Clause of the Federal Constitution, because it makes both the act of storing the gasoline within the State of South Carolina and its importation in Interstate Commerce the joint acts which give rise to the license tax imposed; and that the Court further erred in not holding that a license tax cannot be laid in part upon Interstate Commerce.

6

That the Court erred in not holding that the aforesaid Gasoline Tax Act of 1930, enacted as aforesaid by the General Assembly of the State of South Carolina is repugnant to the Commerce Clause of the Federal Constitution in that it discriminates against gasoline produced by other States, and places the taxes levied only upon persons w[illegible]ad corporations which import in Interstate Commerce gasoline and store the same for twenty-four hours, it appearing [fol. 30] affirmatively amongst other things that gasoline is produced and manufactured within the State of South Carolina, which said gasoline manufactured and produced within the State of South Carolina and stored for future use and consumption in South Carolina is exempt from the tax imposed under the said Gasoline Tax Act of 1930.

7

That the Court erred in not holding that under the undisputed facts of this case, plaintiff was entitled to an injunction against the imposition and enforcement of the threatened tax, there being on adequate remedy at law, and the admitted facts showing that the respondents were threatening to tax gasoline which had been definitely bought in a sister State before its shipment and was not destined for resale, that such gasoline was a product of a sister State, and that such origin was made the basis of the classification for the purpose of such taxation.

8

That the Court erred in holding that in considering the constitutionality of the Act in question, that other Acts of

the General Assembly of said State may be considered in so doing, and that said other acts may supplement and complement the constitutionality of the Act in question, it being submitted to the contrary that the Act in question must stand or fall as to its constitutionality upon its own terms, and that certainly no other Act which is not included within its terms may be read into said Act for the purpose of testing its constitutionality.

9

That the Court erred in holding that the general policy of the State of South Carolina as to the taxation of gasoline as a whole may be considered in testing the constitutionality of the Act in question, and that the fact that there is another Act or Acts which places a tax of six cents per gallon upon all persons, firms or corporations engaging in the business of selling gasoline may be invoked in testing the constitutionality of the present Act, which does not purport to tax sales but which attempts to tax importation in Inter-
[fol. 31] state Commerce and storage alone.

10

That the Court erred in holding that the other Acts referred to in the Acts in question, to-wit: The Act of 1925 and the Act of 1929, purport to place a tax upon gasoline merely used within the State of South Carolina, and that the Standard Oil Company is legally forced and required to pay a gasoline tax within the State of South Carolina upon gasoline used by it in its fleet of trucks in said State; and that the payment of a uniform gasoline tax of six cents per gallon is by statute passed on to all users of gasoline within the State of South Carolina.

11

That the Court erred in holding that the Acts of the State of South Carolina, taken as a whole, reach and tax all gasoline consumed in the State, it being submitted that the Act in question expressly leaves free of taxation gasoline used within twenty-four hours after its importation, which may be a considerable quantity and that the Acts of 1925 and 1929 do not legally impose a tax on gasoline produced and used but not sold, in South Carolina.

That the Court erred in holding that the Act in question, namely, the Gasoline Tax Act of 1930, is not a license tax, which erroneous holding was the basis of its holding that said Act was not repugnant to Section 1, Article 10 of the Constitution of South Carolina, which provides that a license tax may be levied on "occupations and business alone"; it being submitted that the thing taxed herein was merely the owning and holding of one's own property which cannot be said to be either a business or an occupation, and that the Court erred in not holding the tax to be a license tax, and, therefore, repugnant to the aforesaid section of the State Constitution.

For which errors the plaintiffs, petitioners and appellants pray that the decree and opinion of the Supreme Court of South Carolina dated and filed the 13th day of [fol. 32] April, 1931, in the above entitled cause, be reversed, and that the cause be remanded with directions to said Court to grant the order of injunction sought; and for such other and further relief as may be proper in the premises.

P. F. Henderson, B. A. Morgan, Shephard K. Nash,
James M. Lynch, Appellants' Attorneys.

[fol. 33] In Supreme Court of South Carolina

[Title omitted]

Notice of Appeal, With Acceptance of Service

To W. G. Query, J. P. Derham, and Frank C. Robinson, personally and as members of South Carolina Tax Commission, or their Attorneys:

Please to take notice that the plaintiffs and petitioners in the above entitled suit have appealed and do appeal to the Supreme Court of the United States from the decree and final order and judgment entered and granted by the Supreme Court of South Carolina on the 13th day of April, 1931, in so far as the same refused to grant the permanent injunction sought by the plaintiffs or petitioners herein

and in so far as the same grants final judgment against the plaintiffs and in favor of the defendants herein.

Attached hereto are copies of the petition for appeal, order allowing appeal, assignment of errors, citation, and supersedeas and cost bond.

Dated this 8 day of July, 1931.

P. F. Henderson, B. H. Morgan, Shephard K. Nash, James M. Lynch, Attorneys for Appellees.

[fol. 34] Acceptance of Service

Service of the notice of appeal, with papers attached, as listed in the above entitled cause, is hereby accepted this 8th day of July, 1931, for and in behalf of the defendants and Appellees herein.

J. Fraser Lyon, Jno. M. Daniel, Atty. Gen., Their Counsel.

[fols. 35-37] Supersedeas bond on appeal for $1,250.00 approved; omitted in printing.

[fols. 38 & 39] Citation, in usual form, showing service on J. Fraser Lyon and Jno. M. Daniel, omitted in printing

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[fol. 40] In Supreme Court of South Carolina

[Title omitted]

Præcipe for Transcript of Record

The Clerk of the Supreme Court of South Carolina will please proceed to make up the transcript of record in the above entitled cause, including therein:

1. The whole of the printed transcript of record as used and submitted to the Supreme Court of South Carolina, the same being inclusive of the complaint for injunction on the part of the plaintiffs and petitioners, duly verified; the rule to show cause granted on July 3rd, 1930, by Honorable Thomas P. Cothran, Associate Justice, the order of Associate Justice Thomas P. Cothran, dated July 22nd, 1930,

the petition of the County of Sumter, and the order of Associate Justice Thomas P. Cothran, dated July 30th, 1930, the notice and demurrer on the part of the defendants and the agreement and stipulation between counsel.

2. The opinion and final judgment of the Supreme Court of South Carolina, filed on April 13th, 1931, together with the dissenting opinion by Associate Justice Cothran.

3. Petition for appeal and supersedeas, and order granting the same, filed July 8, 1931.

4. Assignment of errors and petition for reversal, filed with petition for appeal.

5. Notice of appeal with acceptance of service thereof. [fols. 41 & 42] 6. Supersedeas and cost bond, with approval thereof.

7. Citation with acceptance of service.

8. This præcipe.

9. Clerk's certificate.

P. F. Henderson, B. A. Morgan, Shephard K. Nash, James M. Lynch, Plaintiffs' and Appellants' Attorneys.

Due legal service of a copy of the foregoing præcipe is accepted this 8th day of July, 1931.

J. Fraser Lyon, Jno. M. Daniel, Atty. Gen., as Attorneys for Defendants, Appellees.

[fol. 42½] [Endorsed:] In the Supreme Court of South Carolina. Original jurisdiction. The City of Greenville et al., plaintiffs-appellants, vs. W. G. Query et al., Defendants-Appellants. Petition for appeal and supersedeas, order thereon, etc. Law offices James M. Lynch, Florence, S. C.

[fol. 43] In Supreme Court of the United States

Statement of Points to be Relied on and Designation of Parts of Record to be Printed—Filed July 20, 1931

Counsel for the plaintiffs in error or appellants herein designate as the points upon which they rely to reverse the judgment and final order of the Supreme Court of South Carolina which heard this cause, the points set out in the

assignment of errors, (in which the same are more fully set out, all of which being relied upon), to-wit:

That the Supreme Court of South Carolina erred in making the decree herein, and in holding that the so-called Gasoline Tax Act of the State of South Carolina, approved April 4, 1930, (Acts of 1930, page 1390) is constitutional, and is not repugnant to the Commerce Clause of the Federal Constitution, and in not holding to the contrary that said Act is unconstitutional, and is repugnant to said Commerce Clause of the Federal Constitution, in that it makes the interstate origin of the gasoline in question the basis of classification in the imposition of the tax; and in that the Court erred in further holding that said Act is constitutional, and is not repugnant to said Commerce Clause of said Federal Constitution, and in not holding to the [fol. 44] contrary that the Act is unconstitutional and repugnant to said Commerce Clause of the said Federal Constitution inasmuch as it levies a tax on gasoline bought outright by plaintiffs before its shipment in interstate commerce and not thereafter resold within the State.

Further, in that said Court erred in holding that the Act in question is not a License Tax Act; and that said Court should have held that said Act was a License Tax Act, and as such is unconstitutional and repugnant to the Commerce Clause of the Federal Constitution, because it makes both the act of storing the gasoline in question within the State of South Carolina and its importation in interstate commerce the joint acts which give rise to the License Tax imposed; and that the Court erred in not holding that a License Tax cannot be laid in part on interstate commerce.

That the Court further erred in not holding that the Act in question is repugnant to the Commerce Clause of the Federal Constitution in that it discriminates against gasoline produced by other States and places the Tax levied only upon persons and corporations which import in interstate commerce gasoline, and store the same for twenty-four hours, it affirmatively appearing among other things that gasoline is produced and manufactured within South Carolina, which gasoline is not reached by the Act in question.

That the Court further erred in not holding that the plaintiffs were entitled to an injunction, there being no adequate remedy at law open to the plaintiffs, and that the respond-

ents were threatening to collect a tax upon said gasoline brought in under the circumstances appearing in the admitted state of facts; and that the Court erred in considering and holding that upon passing upon the constitutionality of the Act in question that other Acts of the General Assembly of said State may be considered in so doing, and that the other Acts may supplement and complement the constitutionality of the Act in question. And that the terms [fol. 45] of other Acts may be invoked in testing the constitutionality of the Act referred to, although said other Acts levy a tax only upon sales of gasoline and do not attempt to tax importation in interstate commerce and storage alone.

That the Supreme Court of South Carolina further erred in holding that the Acts of 1925 and 1929, referred to by them, purport to place a tax upon gasoline merely used within the State of South Carolina, and in holding that the Standard Oil Company is legally forced and required to pay a gasoline tax in South Carolina upon gasoline used in its fleet of trucks in said State, and that the payment of a uniform gasoline tax of six cents per gallon is by Statute passed on to all users of gasoline within the State of South Carolina; and in holding that the Statutes of the State of South Carolina place a tax on all gasoline consumed in the State.

That the Supreme Court of South Carolina further erred in holding that the Act in question is not a License Tax Act, and based upon said erroneous holding in failing to hold that said Act is unconstitutional under Section One, Article Ten of the Constitution of the State of South Carolina, which provides that a License Tax may be levied on "occupations and businesses alone" it appearing affirmatively that the plaintiffs were not operating a storage business, but were only holding their own property until they could use it.

And Appellants designate as the parts of the record which they think necessary for the consideration of this appeal the transcript of record before the Supreme Court of South Carolina, comprising the petition of complaint for injunction, duly verified, the rule to show cause executed by a Justice of the Supreme Court of South Carolina, the notice and demurrer on the part of the defendant, the stipulation or agreement of counsel therein incorporated, and the decision [fols. 46 & 47] and final judgment of the Supreme Court of

South Carolina, rendered and filed on April 13, 1931, the petition for appeal and supersedeas and order granting the same, the assignment of errors and petition for reversal with petition for appeal, the notice of appeal, the supersedeas and cost bond with approval thereof, the citation, the præcipe, this designation of points relied on for reversal, and designation of parts of the record to be printed, together with acceptance of service on all of said papers and the Clerk's Certificate.

P. F. Henderson, B. A. Morgan, Shephard K. Nash, James M. Lynch, Appellants' Attorneys.

Due legal service of a copy of the foregoing designation of points relied on for reversal, and all parts of record necessary to the consideration of the appeal, is hereby accepted.

John M. Daniel, Atty. Gen., J. Fraser Lyons, Appellees' Attorneys.

[fol. 48] [File endorsement omitted.]

Endorsed on cover: File No. 36,059. South Carolina Supreme Court. Term No. 245. The City of Greenville, etc., et al., appellants, vs. W. G. Query, J. P. Derham, and Frank C. Robinson, constituting the State Tax Commission of the State of South Carolina. Filed July 20, 1931. File No. 36,059.

FILE COPY

Office Supreme Court, U. S.
FILED
JUL 8 1931
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 170

GREGG DYEING COMPANY, APPELLANT,

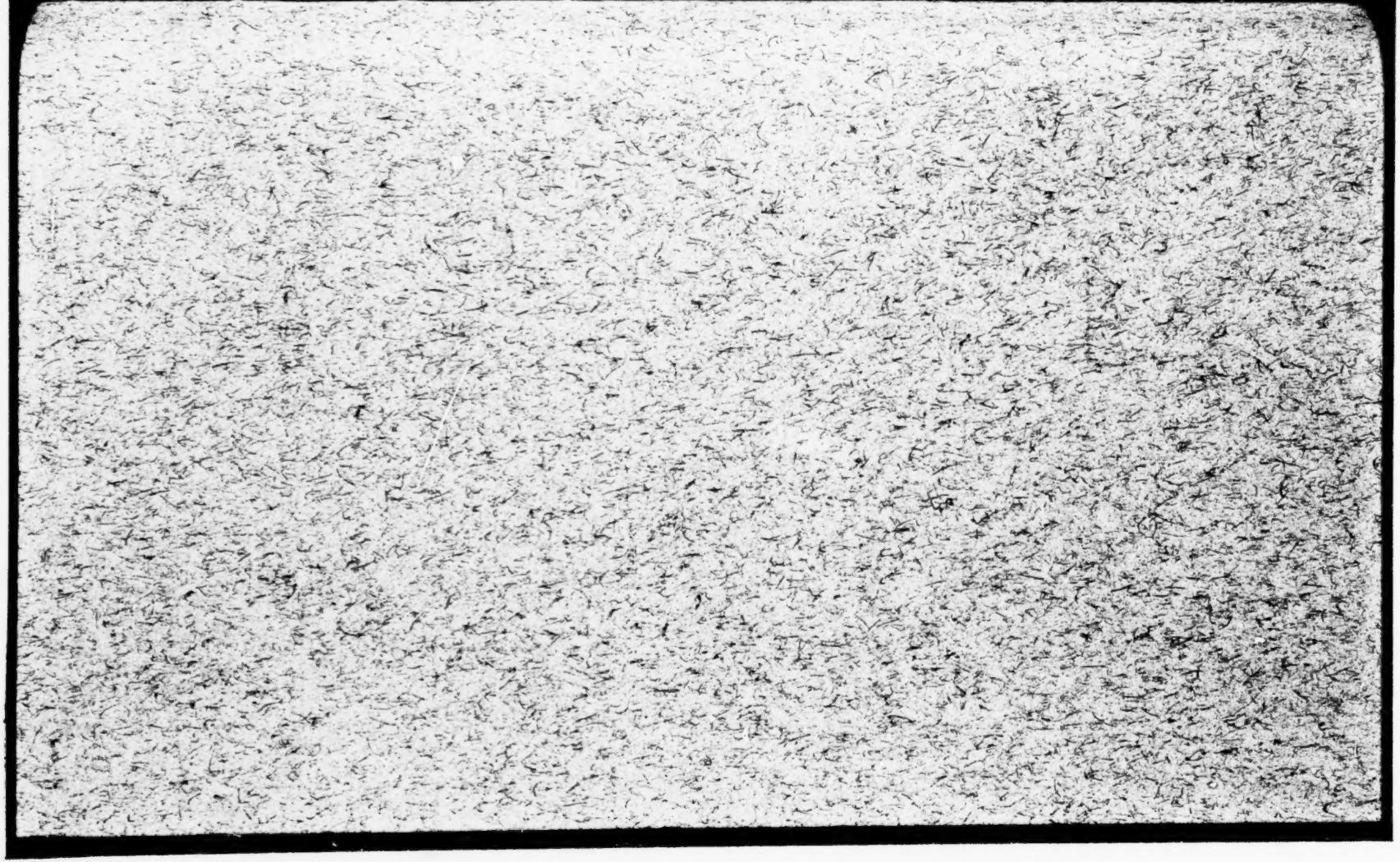
vs.

W. G. QUERY, J. P. DERHAM, AND F. C. ROBINSON, PERSONALLY AND AS MEMBERS OF THE SOUTH CAROLINA TAX COMMISSION.

STATEMENT AS TO JURISDICTION.

P. F. HENDERSON,
Counsel for Appellant.

HENDERSONS & SALLEY,
BOMAR & OSBORNE,
PERRIN & TINSLEY,
HAYNSWORTH & HAYNSWORTH,
Of Counsel.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 170

GREGG DYEING COMPANY, APPELLANT,

vs.

W. G. QUERY, J. P. DERHAM, AND F. C. ROBINSON, PERSONALLY AND AS MEMBERS OF THE SOUTH CAROLINA TAX COMMISSION, APPELLEES.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

STATEMENT OF JURISDICTION.

In compliance with Rule 12 of this Court appellant submits herewith its statement showing the basis of this Court's jurisdiction in the above-entitled cause.

A.

Statutes.

The statutory provisions relied upon to sustain jurisdiction are those allowing an appeal to the Supreme Court of the United States from the final judg-

ment or decree in any suit in the highest court of a State in which a decision in said suit could be had wherein is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution or laws of the United States and the decision is in favor of its validity (which statutes are set out as an appendix to the Rules of this Court adopted June 5, 1928), to wit, the Acts of February 13, 1925, c. 229, 43 Stat. 936; January 31, 1928, c. 14, 45 Stat. 54, and April 26, 1928, c. 440, 45 Stat. 466.

B.

Decree.

The final decree and judgment sought to be reviewed on this appeal was entered by and in the Supreme Court of South Carolina, which is the highest court of the State of South Carolina, on the 13th day of April, 1931 (R. 19).

The petition for appeal (R. 32) was filed and the order allowing the appeal was entered and filed on the 11th day of June, 1931 (R. 34).

C.

Nature of the Case and Rulings Below.

This suit (Transcript of Record, pp. 1-12) was brought in the original jurisdiction of the Supreme Court of South Carolina to enjoin permanently (and *pendente lite*) the appellees personally and as members of the South Carolina Tax Commission from the threatened immediate enforcement of a tax levied by

the Act of the Legislature of the State of South Carolina approved April 4, 1930 (Acts of 1930, p. 1390). Said Act purports to impose a license tax of six cents per gallon on all gasoline "imported" into the State of South Carolina "from any other State or foreign country" and stored in South Carolina for twenty-four hours before its use by its importer. The Act provides no means of paying the tax under protest and of recovering the same by action at law or by any other manner. A Justice of the Supreme Court of South Carolina granted an interlocutory injunction. The matter was later heard upon its merits before the whole court, and on April 13, 1931, the court rendered final judgment refusing the permanent injunction sought, dismissing the complaint, and granting judgment absolute against this appellant for the amount of the tax incurred to date.

Appellant's claim, as revealed by its complaint, was that the License Tax Act in question was repugnant to the commerce clause of the Federal Constitution (Article 1, Section 8, clause 3), and to the equal-protection clause of the 14th Amendment of the Federal Constitution in the following particulars, namely,

(1) That the Act in question burdens Interstate Commerce.

(*a*) In that it makes the interstate origin of the gasoline in question the basis of the classification in the imposition of a tax, and thereby burdens the importation of the gasoline in Interstate Commerce.

(*b*) In that the Act in question levies a tax on gasoline bought outright by the plaintiff before its ship-

ment in interstate commerce, which gasoline is not to be resold and is, in fact, not resold within the State of South Carolina.

(*c*) In that the tax as a license tax is unconstitutional and is repugnant to the commerce clause of the Federal Constitution, because it makes both the act of storing the gasoline within the State of South Carolina and its importation in interstate commerce the joint acts which give rise to the license tax imposed, it being submitted that a license cannot be laid in part upon interstate commerce.

(2) That the Act in question is repugnant both to the commerce clause and equal-protection clause of the 14th Amendment of the Federal Constitution in that it discriminates against gasoline produced by other States and places a license tax by its terms only upon citizens of this State who import and store gasoline so imported from other States, it being a fact that South Carolina produces gasoline in refineries situated within her borders.

The foregoing are the Federal questions presented to the Supreme Court of South Carolina, all of which positions were overruled and disregarded by said court.

D.

Cases Relied on to Sustain the Jurisdiction.

(*a*) Appeal is the proper procedure:
Blodgett *vs.* Silberman, 277 U. S. 1.
Nashville, etc., Railway *vs.* White, 278 U. S. 456.
Great Northern Railway *vs.* Minnesota, 278 U. S. 503.

(*b*) Under the commerce clause:

Standard Oil Co. *vs.* Graves, 249 U. S. 389.
Askren *vs.* Continental Oil Co., 252 U. S. 444.
Bowman *vs.* Oil Company, 256 U. S. 646.
Texas Company *vs.* Brown, 258 U. S. 470.
Sonneborn *vs.* Cureton, 262 U. S. 513.
Hart Refineries *vs* Harmon, 278 U. S. 499.

(*c*) As to license tax laid partly on interstate commerce:

Bowman *vs.* Continental Oil Co., 256 U. S. 646.
Leloup *vs.* Port of Mobile, 127 U. S. 641.
Crutcher *vs.* Kentucky, 141 U. S. 47.
Williams *vs.* Talladega, 226 U. S. 404.

(*d*) As to repugnancy to both commerce clause and equal-protection clause:

Bethlehem Motor Corporation *vs.* Flint, 256 U. S. 421.
Darnell *vs.* Memphis, 208 U. S. 113.
Boyce *vs.* French, 292 Fed. 43.

We respectfully submit that the court has jurisdiction of this appeal by virtue of the statutory provisions hereinabove designated.

Respectfully submitted,

P. F. HENDERSON,
HENDERSONS & SALLEY,
BOMAR & OSBORNE,
PERRIN & TINSLEY,
HAYNSWORTH & HAYNSWORTH,
Solicitors for Appellant.

JUNE 29, 1931.

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Office Supreme Court, U. S.
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Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 245

THE CITY OF GREENVILLE ET AL., APPELLANTS,

vs.

W. G. QUERY, J. P. DERHAM, AND F. C. ROBINSON, CONSTITUTING THE STATE TAX COMMISSION OF SOUTH CAROLINA.

STATEMENT OF JURISDICTION.

P. F. HENDERSON,
B. A. MORGAN,
SHEPHARD K. NASH,
JAMES M. LYNCH,
Counsel for Appellants.

(36,059)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 245

THE CITY OF GREENVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF THE STATE OF SOUTH CAROLINA; THE CITY OF SUMTER, A MUNICIPAL CORPORATION UNDER THE LAWS OF THE STATE OF SOUTH CAROLINA; THE CITY OF FLORENCE, A MUNICIPAL CORPORATION UNDER THE LAWS OF THE STATE OF SOUTH CAROLINA, AND THE COUNTY OF SUMTER, A MUNICIPAL CORPORATION UNDER THE LAWS OF THE STATE OF SOUTH CAROLINA, APPELLANTS,

vs.

W. G. QUERY, J. P. DERHAM, AND F. C. ROBINSON, CONSTITUTING THE STATE TAX COMMISSION OF SOUTH CAROLINA, APPELLEES.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

STATEMENT OF JURISDICTION.

In compliance with Rule 12 of this Court appellants submit herewith their statement showing the basis of this Court's jurisdiction in the above-entitled cause.

A.

Statutes.

The statutory provisions relied upon to sustain jurisdiction are those allowing an appeal to the Supreme Court of the United States from the final judgment or decree in any suit in the highest court of a State in which a decision in said suit could be had, wherein is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution or laws of the United States and the decision is in favor of its validity (which statutes are set out as an appendix to the Rules of this Court adopted June 5, 1928), to wit, the Acts of February 13, 1925, c. 229, 43 Stat. 936, January 31, 1928, c. 14, 45 Stat. 54, and April 26, 1928, c. 440, 45 Stat. 446.

B.

Decree.

The final decree and judgment sought to be reviewed on this appeal was entered by and in the Supreme Court of South Carolina on the 13th day of April, 1931 (R. 19).

The petition for appeal (R. 24) was filed and the order allowing the appeal was entered and filed on the 8th day of July, 1931 (R. 26).

C.

Nature of the Case and Rulings Below.

This suit (R. 1) was brought in the original jurisdiction of the Supreme Court of South Carolina to

enjoin permanently (and *pendente lite*) the appellees personally and as members of the South Carolina Tax Commission from the threatened immediate enforcement of a tax levied by the Act of the Legislature of the State of South Carolina approved April 4, 1930 (Acts of 1930, p. 1390). Said act purports to impose a license tax of six cents per galion on all gasoline "imported" into the State of South Carolina "from any other State or foreign country" and stored in South Carolina for twenty-four hours before its use by its importer. The act provides no means of paying the tax under protest and of recovering the same by action at law or by any other manner. A Justice of the Supreme Court of South Carolina granted an interlocutory injunction. The matter was later heard upon its merits before the whole court and on April 13, 1931, the court rendered final judgment refusing the permanent injunction sought, dismissing the complaint, and granting judgment absolute against these appellants.

Appellants' claim, as revealed by their complaint, was that the License Tax Act in question was repugnant to the commerce clause of the Federal Constitution (Article 1, Section 8, Clause 3), in the following particulars, namely:

(1) That the act in question burdens Interstate Commerce.

(*a*) In that it makes the interstate origin of the gasoline in question the basis of the classification in the imposition of a tax, and thereby burdens the importation of the gasoline in interstate commerce.

(*b*) In that the act in question levies a tax on gasoline bought outright by the plaintiffs before its shipment in interstate commerce, which gasoline is not to be resold and is, in fact, not resold within the State of South Carolina.

(*c*) In that the tax as a license tax is unconstitutional and is repugnant to the commerce clause of the Federal Constitution, because it makes both the act of storing the gasoline within the State of South Caroline and its importation in interstate commerce the joint acts which give rise to the license tax imposed, it being submitted that a license cannot be laid in part upon interstate commerce.

(2) That the act in question is repugnant to the commerce clause of the Federal Constitution in that it discriminates against gasoline produced by other States and places a license tax by its terms only upon citizens of this State who import and store gasoline so imported from other States, it being a fact that South Carolina produces gasoline in refineries situated within her borders.

The foregoing are the Federal questions presented to the Supreme Court of South Carolina, all of which positions were overruled and disregarded by said court.

D.

Cases Relied on to Sustain the Jurisdiction.

(*a*) Appeal is the proper procedure:
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Nashville, etc., Railway *vs.* White, 278 U. S. 456.
Great Northern Railway *vs.* Minnesota, 278 U. S. 503.

(*b*) Under the commerce clause:

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Askren *vs.* Continental Oil Co., 252 U. S. 444.
Bowman *vs.* Oil Company, 256 U. S. 646.
Texas Company *vs.* Brown, 258 U. S. 470.
Sonneborn *vs.* Cureton, 262 U. S. 513.
Hart Refineries *vs.* Harmon, 278 U. S. 499.

(*c*) As to license tax laid partly on interstate commerce:

Bowman *vs.* Continental Oil Co., 256 U. S. 646.
Leloup *vs.* Port of Mobile, 127 U. S. 641.
Crutcher *vs.* Kentucky, 141 U. S. 47.
Williams *vs.* Talladega, 226 U. S. 404.

(*d*) As to repugnancy to both commerce clause and equal-protection clause:

Bethlehem Motor Corporation *vs.* Flint, 256 U. S. 421.
Darnell *vs.* Memphis, 208 U. S. 113.
Boyce *vs.* French, 292 Fed. 43.

We respectfully submit that the Court has jurisdiction of this appeal by virtue of the statutory provisions hereinabove designated.

Respectfully submitted,

P. F. HENDERSON,
B. A. MORGAN,
SHEPHARD K. NASH,
JAMES M. LYNCH,
Solicitors for Appellants.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 170

GREGG DYEING COMPANY, APPELLANT,

vs.

W. G. QUERY, J. P. DERHAM, AND F. C. ROBINSON, PERSONALLY AND AS MEMBERS OF THE SOUTH CAROLINA TAX COMMISSION.

No. 245

THE CITY OF GREENVILLE ET AL., APPELLANTS,

vs.

W. G. QUERY, J. P. DERHAM, AND F. C. ROBINSON, PERSONALLY AND AS MEMBERS OF THE SOUTH CAROLINA TAX COMMISSION.

ARGUMENT OF APPELLANTS' COUNSEL.

P. F. HENDERSON,
HAYNSWORTH & HAYNSWORTH,
BOMAR & OSBORN,
PERRIN & TINSLEY,
Counsel for Gregg Dyeing Company.

JAMES M. LYNCH,
SHEPARD K. NASH,
B. A. MORGAN,
P. F. HENDERSON,
Counsel for City of Greenville et al.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 170

GREGG DYEING COMPANY, APPELLANT,

vs.

W. G. QUERY, J. P. DERHAM, AND F. C. ROBINSON, PERSONALLY AND AS MEMBERS OF THE SOUTH CAROLINA TAX COMMISSION, APPELLEES.

No. 245

THE CITY OF GREENVILLE ET AL., APPELLANTS,

vs.

W. G. QUERY, J. P. DERHAM, AND F. C. ROBINSON, PERSONALLY AND AS MEMBERS OF THE SOUTH CAROLINA TAX COMMISSION, APPELLEES.

ARGUMENT OF APPELLANTS' COUNSEL.

These actions were brought, one by a manufacturing plant chartered under and doing business under the

laws of the State of South Carolina, and the other by various municipal corporations of the State of South Carolina, in the original jurisdiction of the Supreme Court of South Carolina against the members of the Tax Commission, for the purpose of securing an injunction against the enforcement of a tax levied by the so-called Gasoline Tax Act of 1930 of the State of South Carolina. This Act is set out in full at pages 5-8 of the Record in Case Number 245. The present appellants sought the injunction before the Supreme Court of South Carolina upon the ground that the Statute in question was repugnant both to the Constitution of said State, and also to the Commerce and the Equal Protection Clauses of the Federal Constitution. The Supreme Court of South Carolina held the Statute to be constitutional against all attacks, and this is a direct appeal from the final judgment of the Supreme Court of South Carolina, which definitely and finally levies the tax against the appellants.

By this appeal, appellants bring the Federal questions before this Court, submitting in effect,

(1) That the Act in question is repugnant to the Commerce Clause of the Federal Constitution, in that it makes the Interstate origin of the gasoline in question the basis of the classification in the imposition of the tax; and

(2) That it levies a tax on gasoline bought outright by the plaintiff before its shipment in Interstate Commerce, and not thereafter sold within the State; and

(3) That the Act is repugnant both to the Commerce Clause and the Equal Protection Clause of the Federal

Constitution, in that it discriminates against gasoline produced by other states, and places a tax only upon citizens of this State who import and store such gasoline; and

(4) That the tax is a license tax, and that it makes the act of storing the gasoline within the State, *and* its importation in Interstate Commerce, the joint acts which give rise to the license tax imposed, thereby placing a tax on Interstate Commerce.

There are other incidental questions presented by the appeal which will hereinafter be adverted to. The Supreme Court of South Carolina held the Statute to be constitutional in itself; and also held that in considering its constitutionality, resort might be had to the provision of the two other gasoline tax acts of South Carolina (Act No. 34 of 1925, and Act No. 102 of 1929); and that they complemented the Act in question, and in reality presented a state-wide policy of taxing and reaching the consumer of every gallon of gasoline consumed within the State of South Carolina.

We ask to consider first, the question of the constitutionality of the Gasoline Tax Act of 1930 in itself, and secondly, the question of whether or not if it be unconstitutional in itself, it may be complemented and bolstered up by the existence of other acts.

Of course, only the Federal questions are brought to this Court.

The Facts.

The complaints and various stipulations of counsel constitute an agreed statement of facts and may be in-

spected by the Court for the purpose of authoritatively ascertaining the facts.

Briefly stated, the facts are that the Gregg Dyeing Company operates a bleachery at Graniteville, S. C., and uses gasoline in the process of manufacture. It and some other bleacheries in South Carolina buy gasoline in car loads, buying the same outright, usually in Texas, and having the same shipped in, in tank cars, to their manufacturing plants in South Carolina. They store the same and gradually use the gasoline in the manufacture of their goods. The Cities and Counties involved likewise purchase and import in Interstate Commerce, and store for more than twenty-four hours, with intention to use the same in its fire engines, motor trucks, and other agencies, large quantities of gasoline. Until the Gasoline Tax Act of 1930 was passed the Tax Commission of South Carolina had ruled that gasoline so imported was not taxable under any existing license tax law. Hence, it is to be definitely concluded that the Act was passed for the purpose of reaching gasoline brought in, in Interstate Commerce.

The two other Gasoline Tax Acts of the State of South Carolina referred to hereinbefore, plainly levy a license tax of six cents a gallon graduated in accordance with Section 1, Article X of the State Constitution of South Carolina, upon the business of selling gasoline within the State of South Carolina.

The Record reveals the fact that there is a large refinery in South Carolina owned and operated by the Standard Oil Company, where gasoline is manufactured from crude oil; that much of said gasoline is stored in South Carolina and later sold in this state,

and a tax is paid on the sale, but not on the storage; and that much of said gasoline so manufactured in South Carolina and stored temporarily therein, and then shipped out of the state for sale in other states, is not taxed at all.

It is further to be noted that the Gasoline Tax Act of 1930 carefully avoids placing a tax on all gasoline *stored* in South Carolina. It singles out only that which is imported in Interstate Commerce. All of the Acts avoid putting a tax on all consumers of gasoline, for the obvious reason that it would be difficult to collect the tax from every automobile owner. In addition, it is a fact that such gasoline as is brought into the state in trucks (say) and used within twenty-four hours, is not taxed at all. In border counties this could be a considerable amount.

With this situation before it, the Supreme Court of South Carolina swept aside all constitutional objections to the Act of 1930, and in addition held that the Acts of 1925 and 1929 complemented the Act of 1930 if it were unconstitutional.

Opposed to the decision of the majority of the Court is the cogent reasoning of Justice Cothran (R. Gregg Case, page 37):

> "It is clear from the terms of the Act of 1930 that it applies exclusively to importations 'from any other State or foreign country,' which constitute, as recognized by the Act, 'Interstate Commerce.' It is alleged in the complaint and admitted by the demurrer, that gasoline is manufactured from the raw product in South Carolina; the Act has no application to it; neces-

sarily it is a discrimination against Interstate Commerce. The fact, if it be a fact that the tax is being collected from such manufacturers in this State, does not alter the situation; they are not required under the Act to pay it while in storage."

ARGUMENT.

Several preliminary matters may first be referred to:

(*a*) The fact that an injunction is proper on the ground of inadequacy of the remedy at law if the proposed tax is illegal is fully established by the decisions of this Court in *Ware Shoals* v. *Jones*, 78 S. C. 211, and *Western Union* v. *Tax Commssion*, 144 S. C. 234, and in the decision of the United States Supreme Court in *Dawson* v. *Kentucky*, 255 U. S. 288; there being no provision in the Gasoline Tax Act of 1930 allowing the tax to be paid under protest and to be recovered by action in the Court of Common Pleas.

(*b*) It is to be noted that the Act in question provides that the gasoline shall be taxed "after the same has lost its interstate character as a shipment in Interstate Commerce." As to this generality, we wish to point out that in *Bethlehem Motors Corporation* v. *Flynt*, 256 U. S. 421, it is ruled by the Supreme Court of the United States specifically, that automobiles brought into a state from another state, do not lose their interstate characer as long as they are in the hands of the original importer; in *Sonneborn* v. *Cureton*, 262 U. S. 513, the "original package" doctrine was abandoned; and in *Darnell* v. *Memphis*, 208 U. S. 113, it is held that goods which are taxed because they

have been brought in from another state, cannot be taxed on the ground that they have lost their interstate character. Also see *Cooley on Taxation*, Sec. 407, hereinafter quoted. This question is treated of incidentally throughout the argument, and really permeates the whole consideration.

(*c*) Something was said in the argument below about the motive of the appellants and their effort to evade a just tax. To begin with, this Court has held that the motive of the taxpayer is immaterial. The question is the legality of the tax. *Oil Company* v. *Mississippi*, 74 L. Ed. 320. The motive of the municipality is to save taxation for the citizens of such cities. The reasoning of the Gregg Company, while the same does not present a legal ground, is the very human idea that as its gasoline is not used on the roads that unless it be legally bound so to do, that it should not be forced through a gasoline tax to keep up the roads, but that this burden should be placed on the automobilist who daily uses the roads.

(*d*) The Supreme Court of Florida, in *Sheip* v. *Amos*, 130 So. 699, has quite recently held a statute similar to the South Carolina Act to be constitutional. This decision is, of course, no more authoritative than that of the Supreme Court of South Carolina.

We will then pass to the constitutional questions.

Does the Gasoline Tax Act of 1930 Burden Interstate Commerce?

The undoubted general rule is that under the Commerce Clause of the Federal Constitution (Article I,

Section 8, Clause 3) no tax, whether a property tax or a license tax, can be levied which will burden Interstate Commerce.

Telephone Company v. *State Board*, 73 L. Ed. 145.
Helson v. *Kentucky*, 279 U. S. 249.
Standard Oil Company v. *Graves*, 249 U. S. 389.
Coe v. *Errol*, 116 U. S. 27.

It is to be noted that it is alleged in the complaint that Interstate Commerce is a subject upon which Congress has legislated. In any event the imposition of a property tax or a license tax upon Interstate Commerce would be unconstitutional.

Missouri v. *Kansas Gasoline Co.*, 256 U. S. 309.

The following line of recent decisions of the United States Supreme Court involves the question of the taxing of Interstate importations of gasoline or oils and are appropriately conclusive, we submit, of the exact question involved in this case; and their consideration renders a complete survey of the field of the law of Interstate Commerce unnecessary. These decisions are:

Standard Oil Co. v. *Graves*, 249 U. S. 389.
Askren v. *Continental Oil Co.*, 252 U. S. 444.
Bowman v. *Oil Company*, 256 U. S. 646.
Texas Company v. *Brown*, 258 U. S. 470.
Sonneborn v. *Cureton*, 262 U. S. 513.
Hart Refineries v. *Harmon*, 278 U. S. 499.
Breece Lumber Company v. *Marabel*, — U. S. —.

This line of decisions, after first indicating that the old idea of the law of the *original package* would be applicable to gasoline, and that no gasoline could be taxed which, after its importation into South Carolina (say), was sold in its original package, changed the rule completely in the case of *Sonneborn* v. *Cureton*, 262 U. S. 513. In that case, which alone needs to be closely considered herein, the Court abandoned the "original package" rule and substituted a new rule or set of rules, which fact is deduced from the words of the Court itself hereinafter set out.

The crux of this matter is the question of whether the majority opinion of the Supreme Court of South Carolina placed the proper construction upon the Sonneborn decision as applying to the facts of this case, or whether Justice Cothran in his dissenting opinion properly construed that decision of this Court. We earnestly submit that Judge Cothran's construction of the Sonneborn decision was the correct one.

The majority decision of the Supreme Court of South Carolina in discussing the Sonneborn decision (R. Gregg Case, pp. 25-27), referring to the Gregg Company, says:

> "The gasoline is delivered at its plant in Aiken in these 'original packages,' and upon delivery it is transferred from the 'original packages' to its own tanks and stored for future use * * *, and has become at rest as a part of the general mass of property in this state * * *. Its immunity from State taxation is then at an end."

Then the majority of the Court sweeps aside all else that is in the Sonneborn decision, and holds that as the

sale of the oil in that case could be taxed after its original packages had been broken and it had come to rest, that likewise the storage of gasoline brought into South Carolina by the Gregg Company for its own use could be taxed *for its storage, although no other gasoline in South Carolina is taxed for its storage.* Thus the majority of the Court disposes of the Commerce Clause and of the Interstate question.

Judge Cothran, on the other hand (R. 36), held that the Sonneborn case has abrogated, as the decisive test, the original package rule; and by his quotation from the Sonneborn decision, made plain that he held that the test was that, the sale of gasoline after it had come to rest, whether "*in the original package or not,*" would be legal "if the state law levied the same tax on all oil and all sales of it without regard to origin." Then Judge Cothran quoted the following decisive language from the Sonneborn decision:

> "A state tax upon merchandise brought in from another state or upon its sale, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is *not discriminating in its incidence against the merchandise because of its origin in another state.*" (Italics added.)

In the Sonneborn case, all sales of oil in Texas were taxed. Various classes of sales were involved. Two classes, as stated by the Court (262 U. S. 509), were—

> "(1) Those from the sale of oil which, when sold, was not in Texas * * *;

> "(2) Those arising from the sale of oil shipped into Texas and afterwards sold from the storerooms in unbroken packages."

The first class of oil referred to is entirely similar to the gasoline imported by the appellants in the instant cases, which is gasoline purchased outright before it is shipped into the State of South Carolina, and as to which the appellants have made no use whatsoever up to the time that it is taxed. As to this first class of oil which is in the same situation as the gasoline in the instant cases, the Supreme Court of the United States said:

> "Many of the sales by the appellants were made by them *before the oil to fulfill the sales was sent to Texas. These were properly trected by the state authorities as exempt from state taxation.* They were in effect contracts for the sale and delivery of *the oil across state lines.* The soliciting of orders for such sales is equally exempt. *Such transactions are interstate commerce in its essence and any state tax upon it is a regulation of it and a burden upon it.* Robbins *v.* Shelby County Taxing District, 120 U. S. 489. Asher *v.* Texas, 128 U. S. 129; Stoutenburgh *v.* Hennick, 129 U. S. 141; Caldwell *v.* North Carolina, 187 U. S. 622; Rearick *v.* Pennsylvania, 203 U. S. 507; Brennan *v.* Titusville, 153 U. S. 289; Dozier *v.* Alabama, 218 U. S. 124; Crenshaw *v.* Arkansas, 227 U. S. 389; Stewart *v.* Michigan, 232 U. S. 665; Western Oil Refining Co. *v.* Lipscomb, 244 U. S. 346. * * *." (Italics added.)

The main question involved in the Sonneborn case was as to oil sold in its original packages *after it had*

been brought into the State of Texas. The contention of the oil company was, that as it was sold in the original package, that the State could not tax it. The Court with great care reviewed all of the original package cases and determined that in justice they must apply to foreign imports alone, and not to commerce between the states; and the Court entirely abrogated the original package doctrine as to interstate shipments, which the Supreme Court of South Carolina continues to adhere to in its decision in the Gregg case. In lieu of the original package idea, we submit that the Court promulgated the rule set out in the foregoing excerpt as covering goods purchased outright before their shipment into a state in Interstate Commerce; and then as to all goods brought in, in Interstate Commerce, and sold after they reached the state of their purchaser, this Court promulgated the rule enunciated in the following language:

> "A state tax upon merchandise brought in from another state or upon its sales, whether in original packages or not, after it has reached its destination and *is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another state.* This distinction is illustrated in the difference between those cases which uphold the validity of a tax upon peddlers engaged in selling merchandise from out of the State which they carry with them, like those of Machine Co. *v.* Gage, 100 U. S. 676; Emert *v.* Missouri, 156 U. S. 296; Baccus *v.* Louisiana, 232 U. S. 334; and Wagner *v.* Covington, 251 U. S. 95, on the one hand, and that

> of Welton *v.* Missouri, 91 U. S. 275, in which a peddler's tax was held bad because it was levied only on goods from other states, on the other. Ward *v.* Maryland, 12 Wall. 418, 429; Guy *v.* Baltimore, 100 U. S. 434, 443, 444; Tiernan *v.* Rinker, 102 U. S. 123, Webber *v.* Virginia, 103 U. S. 344, 350, and Walling *v.* Michigan, 116 U. S. 446, are other instances showing the invalidity of state tax laws discriminating against merchandise brought in from other states." (Italics added.)

From the foregoing quotations from the Sonneborn decision of the Supreme Court, in a case which was meant sedately and authoritatively to settle the question of the taxing of gasoline imported into a state, we submit that the new rule or rules may be deduced, to-wit:

(1) The original package idea and the idea of the goods "coming to rest" in the state into which they have been imported, as the decisive test, has been discarded.

(2) A tax may never be levied upon goods definitely bought before their interstate importation (of course, unless they are resold in the state into which they are imported; or unless the *use* of all such articles within the state is taxed, regardless of their origin).

(3) A tax of any kind which makes the *interstate origin* of the goods the basis of the classification upon which the license tax is based, is clearly unconstitutional.

The deductions and conclusions just set out as drawn from the *Sonneborn case*, are confirmed in the last case upon the subject (*Hart Refineries* v. *Harmon, supra*) in which the converse of the situation arising in the instant case, was presented to this Court. In the Hart case, the State of Montana had passed an Act *taxing all sales of gasoline made within the State of Montana.* The Montana Refineries objected that the tax discriminated against them "because it was not extended to include gasoline shipped from other States and consumed or used after it had come to rest in Montana, and its status in Interstate Commerce had ended." This Court construed the Sonneborn decision, holding that while it meant that a state might lay a tax on the *use* of gasoline as well as on its *sale*, that still *if every sale made in Montana is taxed*, that the fact that the statute failed to tax the *use* of gasoline imported in Interstate Commerce for use, as in the present case, did not constitute a discrimination.

The Hart decision is entirely confirmatory of Justice Cothran's dissent herein. In the present case the storage on all gasoline in the State of South Carolina with intent to use it is not taxed by the Gasoline Tax Act of 1930. The Act taxes only gasoline which has been imported, in Interstate Commerce. In the Hart case this Court specifically held that such a tax was constitutional only, "*if laid on the commodity generally without regard to its origin,*" and provided "*it does not discriminate against the commodity because of its origin in another state.*"

It is submitted that the Gasoline Tax Act of 1930 embodies both of the vices noted.

It is submitted that the Gasoline Tax Act of 1930 is unconstitutional and is repugnant to the Commerce Clause of the Constitution of the United States, both because it purports to tax gasoline which has been bought outright before it has been shipped into the State in Interstate Commerce, and before any use or sale of it, is made in South Carolina, and particularly because it purports to tax no gasoline except that which has been shipped in, in Interstate Commerce. In other words, it makes the basis of the classification for taxation, the Interstate origin of the gasoline taxed.

We submit that Justice Cothran's dissenting opinion was correct.

Gasoline Tax Act of 1930 Repugnant to Both Commerce Clause and Equal Protection Clause, in That It Discriminates Against Gasoline Produced by Other States and Places License Tax Only Upon Citizens of This State Who Import and Store Such Gasoline.

In so far as the Commerce Clause is concerned, this contention is closely akin to the consideration already presented, but does present the question from a different angle. Our contention applies with especial cogency to the State of South Carolina in which gasoline is actually produced.

The law upon the subject and the distinction between the operation in this regard, of the Commerce Clause and of the Equal Protection Clause of the Fourteenth Amendment, is made clear from a consideration of the

case of *Bethlehem Motors Corporation* v. *Flynt*, 256 U. S. 421.

In that case the State of North Carolina had passed an Act levying a tax to be paid by any person or corporation selling "automobiles in this State, the manufacturer of which has not paid the annual license tax provided in this section," and further providing that four-fifths of said tax should be remitted in case the person or corporation had invested in the State "at least three-fourths of the entire assets of the said manufacturer of automobiles."

The plaintiffs who manufactured automobiles in Pennsylvania and Indiana raised the objection that the Statute was repugnant both to the Equal Protection Clause of the Fourteenth Amendment and to the Commerce Clause of the Federal Constitution.

As to the Equal Protection Clause, this Court ruled in the following language:

> "If the Pennsylvania Corporation and the Indiana Corporation * * * are doing business in the State and therefore within its jurisdiction, they undoubtedly *can complain of a discrimination against them that is offensive to the Fourteenth Amendment. Southern Railway Company* v. *Green*, 216 U. S. 400-415." (Italics added.)

This Court then referred to the discriminating condition set out in the Taxing Statute which gave immunity to the extent of four-fifths of the tax to automobile manufacturers who invested three-fourths of their entire assets in the State of North Carolina.

The Court ruled:

> "The condition can be satisfied by a resident manufacturer, his factory and his products in the first instance being within the State; it cannot be satisfied by a nonresident manufacturer, his factory necessarily being in another State, some of its products only at a given time being within the State. Therefore, there is a real discrimination, and an offense against the Fourteenth Amendment, if we assume that the corporations are within the State."

From the foregoing, it appears perfectly plainly, we submit, that a corporation of the State of South Carolina doing business in the State of South Carolina, such as the Gregg Dyeing Company, plaintiff herein, may not be discriminated against because it buys its gasoline from another state, while other citizens of the state and other bleacheries who buy gasoline locally are not subject to the tax provided by the Gasoline Tax Act of 1930.

As to the Commerce Clause of the Constitution involved in the same case, this Court in the *Bethlehem Motors Company* case said:

> "Their second contention is that the Act is an attempt to regulate Interstate Commerce. If it have that effect it is illegal, for a tax on an agent of a foreign corporation for the sale of a product is a tax on the produce, and, if the product be that of another State, it is a tax on commerce between the States. *Welton* v. *Missouri*, 90 U. S. 275; *Webber* v. *Virginia*, 103 U. S. 344; *Darnell & Sons Co.* v. *Memphis*, 208 U. S. 113. This is the assertion of plaintiffs in

> error; defendants in error oppose a denial to the assertion and the denial is supported by the Supreme Court on the authority of *Brown* v. *Houston*, 114 U. S. 622; *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304. The basis of the denial and its support by the Supreme Court is that the automobiles had passed out of Interstate Commerce *and had reached repose in the State* and become blended with the other things of the State, and become subject to intrastate regulation. It is doubtful if that be a justifiable deduction from the findings of the trial court. But comment is not necessary. It is the finding of the Court that the automobiles were in the hands of the agents of the consigning corporations, *and therefore a tax against them was practically a tax on their importations into the State.*" (Italics added.)

The question of discrimination, as against the Equal Protection Clause of the Fourteenth Amendment in gasoline cases, was before this Court in *Hart Refineries* v. *Harmon, supra.* In that case the refineries complained that they were discriminated against because the tax reached only the sale of gasoline in the State of Montana, and because those who imported gasoline in Interstate Commerce and used it without buying it in Montana were not subject to the same tax. This Court ruled that inasmuch as all persons within the State who *sold* gasoline were taxed, that there was no discrimination. The Court, discussing the Equal Protection Clause of the Fourteenth Amendment, said:

> "That clause does not prohibit classification; and the power of the State to classify for the

> purpose of taxation is a wide range in flexibility, provided that the classification rests upon a substantial difference *so that all persons similarly circumstanced will be treated alike.* It is enough if all of the same class *are included and treated alike.*" (Italics added.)

Our contention is that there are myriads of persons in the State of South Carolina who *store with the intent to use in their businesses,* gasoline. The Gasoline Tax Act of 1930 places the tax therein levied only upon those who acquire the gasoline which they do store with the intent to use in their businesses, from other states than South Carolina.

As to the Commerce Clause, in addition to the *Bethlehem case,* the following authorities directly rule that to levy a tax upon products of sister states is violative of the Commerce Clause of the Federal Constitution.

Darnell v. *Memphis,* 208 U. S. 113:

In this case a tax was levied on logs which had been brought into the State of Tennessee, no similar tax being levied on logs produced within the State of Tennessee. The Supreme Court of the United States ruled:

> "The Court in its opinion conceded that the property embraced in the assessment complained of was purchased by the complainant in and brought from other states, or consisted of lumber produced from logs so brought into Tennessee, and that property of like character would not be subject to taxation under the state law if it had been produced from the soil of Tennessee.

"As a prelude to a review of the cases referred to we observe that while it is undoubted that it has been settled that where property which has moved in the channels of Interstate Commerce is at rest within a state and has become commingled with the mass of property therein, it may be taxed by such state without thereby imposing a direct burden upon Interstate Commerec, *that doctrine * * * has always expressly excluded the conception that a State could, without* directly burdening Interstate Commerce, *discriminate against such property by imposing upon it a burden of taxation greater than that levied upon domestic property of a like nature.*

"The leading cases announcing the doctrine that a state may tax property which had moved in the channels of Interstate Commerce, when such property had become at rest therein, even before the sale in the original package, are *Woodruff* v. *Parham*, 8 Wall. 123, and *Brown* v. *Houston*, 114 U. S. 622. But in both those cases it was sedulously pointed out that the power which was thus recognized, *did not, and could not, include the authority to burden the property brought from another State with a discriminating tax.* In *American Steel Wire Co.* v. *Speed*, 192 U. S. 500, 519, where the doctrine of *Woodruff* v. *Parham* and *Brown* v. *Houston* was reviewed and restated, it was pointed out that to prevent the levy of a tax upon property brought from another state, even after it had come at rest within a state, from being a direct burden upon Interstate Commerce, property so situated must be taxed '*without discrimination, like other property situated within the State.*'" (Italics added.)

After a review of the authorities, the Court concluded:

> "As there can be no doubt within the principles so clearly settled by the decided cases, to which we have referred, that the disputed tax, which the Court below sustained, was a direct burden upon Interstate Commerce since the law of Tennessee in terms discriminated against property the product of the soil of other states brought into the State of Tennessee by exempting like property when produced from the soil of Tennessee, it follows that the Court below erred in deciding the tax to be valid, without reference to the reasoning indulged in by it concerning the application of the Equal Protection Clause of the Fourteenth Amendment."

Boyce v. *French*, 293 Fed. 43:

In this case a tax was levied on dealers in seeds which had been imported into the State of Washington. No similar tax was levied on dealers of seeds produced within the State of Washington.

The Court said:

> "This discrimination against the seeds of other States, in its essence, places an unwarranted burden upon Interstate Commerce, and a Statute imposing such burden cannot be upheld under Article I, Section 8, Subsection 3 of the Constitution of the United States, granting Congress power to regulate commerce with the foreign nations and among the several states, and with the Indian Tribes."

Cooley on Taxation, Sections 406-7:

> "SECTION 406. It is a violation of the commerce clause to discriminate in taxation in favor of home products and against products and manufacturers of other states or foreign countries. In other words, a *commodity cannot be taxed because of the fact that it has been transported from another state;* since the exclusive power of Congress to regulate Interstate Commerce 'continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. The power protects it, even after it has entered the state, *from any burdens imposed by reason of its foreign origin.*'" (Italics added.)
>
> "SECTION 407. A privilege tax on a dealer in goods shipped into the state from a sister state, simply because the goods were shipped from another state, is practically a tax on the goods themselves and is invalid as a discrimination in violation of the commerce clauses; and *it is immaterial that the goods had come to a rest within the state, and were held in storage for sale to retail dealers from time to time.*" (Italics added.)

Hence, it is submitted that inasmuch as the tax imposed by the Gasoline Act of 1930 clearly discriminates against the plaintiff which uses gasoline imported in Interstate Commerce while those buying gasoline elsewhere are not subjected to the tax levied by said Act; and as said Act discriminates against the products of sister states, that said Act is repugnant both to the Fourteenth Amendment and to the Commerce Clause of the Constitution.

This is especially true in South Carolina where gasoline is produced. It is pointed out in *Texas Company* v. *Brown*, 258 U. S. at 476, that Georgia, in which state that case arose, and New Mexico, in which the *Askren* and the *Bowman cases* arose, *produce no gasoline whatsoever. South Carolina does produce gasoline.* The Standard Oil Company has a large refinery in Charleston County, produces much gasoline, some of which it sells, and all of which it stores for more than twenty-four hours.

We submit, in the light of this fact, that the Gasoline Tax Act of 1930 becomes clearly repugnant to both the Equal Protection Clause and the Commerce Clause of the Federal Constitution. It attempts to tax plaintiff in its storage of gasoline, whereas the Standard Oil Company pays no storage tax upon its gasoline which it produces, stores, and uses in South Carolina, and myriads of other businesses which buy gasoline from South Carolina dealers *pay no storage license tax.*

An additional consideration of great importance, we submit, lies in the decisions to the effect that a tax, whether license or excise, may not be levying upon the holding (storing) of *one's own property.* The Act of 1930 purports to tax interstate importation and storage. We set out the authorities and submit that if holding and storing one's own property is illegal, that then all that is left in the Act is an attempt to tax Interstate Commerce pure and simple.

We cite the following authorities:

Cooley on Taxation, Section 1676, page 3382:

> "A tax levied by reason of ownership of property is said to be a tax on the property rather than an occupation tax, and it is also held that a tax on the right of ownership on a thing is a tax on the thing itself. The *mere right to own or hold* property cannot be made the subject of excise tax." (Italics added.)

In re Opinion of Justice, 84 N. E. 499:

In the State of Massachusetts the practice allows the Legislature to submit the constitutionality of proposed legislation to the Supreme Court of the State in advance of the passage of said acts. In the volume and page above stated, there appears the answer of the Supreme Court for Massachusetts to an inquiry as to the constitutionality of various proposed taxes. Amongst the inquiries is the constitutionality of a proposed act taking the ownership and the holding of property under ownership. The Supreme Court of Massachusetts, in disposing of this question, answered directly:

> "The mere right *to own and hold property* such as is referred to in the question, cannot be made the subject of an excise tax." (Italics added.)

The property referred to was money in hand, stocks, bonds and securities.

Freiberg v. *Dawson*, 274 Fed. 420-434:

The property in question in this litigation was whisky. The Circuit Court of Appeals ruled:

"The principles which limit the definition of a permissible excise tax are discussed in the familiar textbooks and digest, and, among many instances, by Chief Justice Fuller in *Pollock* v. *Farmers' Co.*, 157 U. S. 429, 580, 15 Sup. Ct. 673, 39 L. Ed. 759, *et seq.*, and by Judge O'Rear, for the Kentucky Court of Appeals, in *Standard Oil Company* v. *Commonwealth*, 119 Ky. 75, 79-81, 82 S. W. 1020. The controlling proposition is that the mere right *to own and hold property cannot be made the subject of excise.* The principle has been applied, for example, to the mere owning of timber (*Thompson* v. *Kreutzer*, 112 Miss. 165, 72 South. 891), and to devoting it to a turpentine orchard, the use for which it was most available (*Thompson* v. *McLeod*, 112 Miss., 383, 73 South. 193 L. R. A. 1918-C, 893 Ann. Cas. 1918-A, 674."

Should the tax be a property tax (*Dawson* v. *Kentucky Distilleries*, 255 U. S. 288) the ruling of the Supreme Court of South Carolina to the contrary notwithstanding, then it is discriminatory in that it levies a tax of forty-eight per cent, whereas the property tax in South Carolina is forty-seven mills on the dollar. This matter is the subject of appellants' thirteenth assignment of error. We submit, under the *Dawson case*, that the tax is a property tax.

The Supreme Court of South Carolina further seeks to sustain the Acts of 1930, because it taxes the storage of inflammable materials. Even if such a general doctrine is to be given approval, then the Act of 1930 clearly falls because it does not tax the storage of all inflammable material, nor even the storage of all gaso-

line in South Carolina, but only the storage of such gasoline as has been imported in Interstate Commerce.

The Tax is Unconstitutional as a License Tax Because It Taxes Both Interstate Importation and Storage Within the State.

The Act of 1930 in its title and throughout its entire body denominates itself as a license tax. If it is sustainable at all, it is on the business of storing one's own gasoline. The Supreme Court of South Carolina (R. Gregg Case, p. 33) said in effect that, it had not time nor opportunity to explore into the origin of excise taxation, but that it thought this was an excise and not a license tax. We submit, on the authority of Cooley on Taxation, Section 1673, that the term "excise tax" is a generic term which is divided into many subdivisions. Mr. Cooley gives as subdivisions, license taxes, corporate franchise taxes, sales, inheritance, documentary stamp taxes, etc. Hence, the Act of 1930 can be an excise tax and at the same time a license tax. Such its authors termed it throughout, and such it has every earmark of being. It is *graduated* at so much per gallon, as is required by Section I, Article X of the Constitution of South Carolina.

This Court will judge of its nature despite the holding of the South Carolina Court (*New Jersey Bell Telephone Company* v. *State Board,* 74 L. Ed. —; *Storaasli* v. *Minnesota,* 75 L. Ed. 485.

If the Act imposes a License Tax, we submit it is clearly unconstitutional as placing a License Tax on Interstate Commerce and storage. The Act provides:

> "Every person, firm, and corporation * * * which shall import into this State from any other State or foreign country, or shall receive by any means into this State, AND keep in storage in this State for a period of twenty-four hours or more * * * any gasoline."

Hence, it clearly appears that what the license tax in question is laid upon is two acts, the concurrence of both of which is necessary to the placing of the tax, namely,

> (1) The importation of the gasoline in Interstate Commerce, AND
>
> (2) Storing said gasoline within the State of South Carolina for a period of twenty-four hours with the intent to use and consume it.

We submit that the decisions of this Court clearly hold that an act that does this is repugnant to the Commerce Clause of the Federal Constitution.

We cite:

Bowman v. *Continental Oil Co.*, 256 U. S. 646.
Leloup v. *Port of Mobile*, 127 U. S. 641.
Crutcher v. *Kentucky*, 141 U. S. 47.
Williams v. *Talladega*, 226 U. S. 404.

In the *Bowman case*, the Court said:

> "*The subject taxed is not in its nature divisible, as in the case of the excise tax. The imposition falls upon the entire business indiscriminately;* and so does the prohibition against the further conduct of business without making the payment. By accepted canons of construc-

> tion, the provisions of the Act in respect of this tax are not capable of separations *so as to confine them to domestic trade,* leaving interstate commerce exempt. United States *v.* Reese, 92 U. S. 214, 221; Trade-Mark Cases, 100 U. S. 82, 99; Poindexter *v.* Greenhow, 114 U. S. 270, 304-305."

The *Leloup case, supra,* and the *Talladega case, supra,* both involve City Ordinances placing license taxes on telegraph companies doing business in said municipalities. In the earlier case, the *Leloup case,* the ordinance baldly placed a license tax on telegraph companies doing business in the municipality in question. This Court ruled that the license tax was inseparable, and that as it had the effect of taxing interstate business as well as intrastate business, that the whole license tax being indivisible, must fall, as it became repugnant to the Commerce Clause of the Federal Constitution.

In the *Talladega case* the ordinance as drawn excepted interstate business but failed to except governmental business, that is to say, telegrams sent from and into Talladega by agents of the Federal Government. This Court ruled that as the license tax in question in reality would cover governmental business as well as intrastate business, although interstate business was excepted, that the license was indivisible, and that it was repugnant to the Commerce Clause.

If the Statute Within Itself is Repugnant to the Federal Constitution, Can Other Statutes Be Read Into It, Complement It, and Bolster Up Its Constitutionality?

It will be recalled that the Statutes of 1925 and 1929 of South Carolina provide, in effect, that oil companies selling gasoline shall pay a tax of six cents a gallon for each gallon so sold; that the Act of 1930 provides that whoever imports in Interstate Commerce and stores for more than twenty-four hours, with intention to use, gasoline, shall pay a similar tax, and that there is no uniform act placing a tax on all who store gasoline, nor on all who consume gasoline within the State of South Carolina. It will further be recalled that importers, who bring gasoline into the State from sister states, in trucks for instance, and use the same within twenty-four hours, are not taxed at all; and that all of the gasoline which is manufactured by the Standard Oil Company in their refinery in Charleston, and is there stored and later shipped beyond the limits of the State, is in no fashion taxed. Nevertheless, the Supreme Court of South Carolina, referring to the Gasoline Tax Act of 1930, ruled:

> "The Act in question may be said to be complementary to the other statutes of the State under which are assessed a gallonage tax on gasoline and other petroleum products. * * * Thus, with the Act of 1930 complementing the other statutes referred to, all consumers of gasoline in the State of South Carolina pay a tax of six cents per gallon, no matter what the

> origin of, or State in which, the gasoline is produced."

The position is that the Acts combined place upon the consumer of all gasoline in South Carolina a uniform tax of six cents a gallon, and that in *testing the constitutionality* of the Act of 1930, which taxes importation in Interstate Commerce and storage with intent to use, that the Sales Acts of 1925 and 1929 may be read into the Act of 1930, although it refers to the other acts only by way of exclusion.

In opposition to this position, we submit:

(1) The idea invoked by the Supreme Court of South Carolina, that from a legal standpoint, the tax is necessarily passed, as matter of law, on to the consumer, and can be deemed paid by him in considering the constitutionality of the question, is based upon a mere *obiter* by Justice Pitney in *Texas* v. *Brown* (258 U. S. 466) to the effect that the Legislature of Georgia in the Act then under review, intended the tax to fall on the consumer.

In the very recent case of *Panhandle Oil Company* v. *Knox*, 277 U. S. 218, this Court, reviewing a similar situation, did not baldly say that the tax as a matter of law fell upon the consumer, but placed the matter upon a much sounder basis, saying:

> "To use the number of gallons sold the United States as a measure of the privilege tax, is, in substance and effect, to tax the sale."

The holding of this Court therein, we submit, was that the Act in question became a sales tax because

the gallonage was used as a basis, and there was no legal holding that as matter of law the payment of the tax was passed on to the consumer in such manner as to affect the constitutionality of the Statute. (It is also interesting to note that the very statute in question—see p. 220—specifically excepted from the tax gasoline brought in in Interstate Commerce.)

To this may be added the cogent reasoning of Judge Parker in an opinion of a Three-Judge Court in *Eastern Air Transport, Inc.*, v. *Query et al.*, — Fed. —. Herein the constitutionality of the South Carolina Gasoline Act of 1929 was considered. The Statutory Court held that it was a tax on the sale of gasoline. Complainant contended that the Supreme Court of South Carolina had held in the instant case—the Gregg case—that the tax was passed on to the consumer, and that this fact made the tax one on the *use* of the gasoline, and brought the matter directly under the principle of *The Helson* v. *Kentucky*, 279 U. S. 245 (the Ferryboat case). The Court held to the contrary, holding that the fact that the consumer might eventually pay the tax, did not legally change its nature from a tax on sales to one on use.

Hence, we submit that the question of who bears the tax cannot legally be said to change the nature of the tax, and to sweep aside the serious objection that South Carolina is attempting to tax some gasoline as to sales, and some as to importation and storage, and to allow some which is imported into the State and stored to go free of any taxation, and to allow some which is manufactured in the State and stored therein and exported to go free of taxation.

Besides all of this, it cannot be said legally that all sales taxes are necessarily borne by the consumer. There has recently appeared in the Chicago Tribune—see page 11, Literary Digest, November 7, 1931—an interesting article upon the proposed Selective Sales Tax, which is to be presented to Congress, in which article it is predicted that, at least as to the smaller of such proposed sale taxes, the tax will "be absorbed by the manufacturer without increasing the cost to the consumer." Again, it is entirely conceivable that even with larger taxes, that in times of prosperity, which we so confidently look forward to, that competition between dealers may become so keen that the dealer may absorb the tax; and, even in times of deep depression, in order to sell its produce at all, that the dealer may be forced to bear the tax.

(2) Further, we sharply challenge the postulate that in passing upon the constitutionality of a statute another statute may be read into it, or that the existence of another statute may be used to complement it or to bolster it up. We submit that to stand the test of constitutionality, the statute must be constitutional within its four corners. We wish to state after a most exhaustive search of the authorities, and after correspondence with the nation-wide law publishers, that no case has been found which holds that in testing constitutionality recourse may be had to other statutes (except, of course, the Florida case, which is but a sister case to the present one).

Multitudes of authorities are found which state that recourse may be had to other statutes where a statute

is ambiguous in aid of statutory construction, and here the matter ends. The Gasoline Tax Act of 1930 is in no sense ambiguous. Its terms are plain. It taxes only gasoline brought into the State in Interstate Commerce.

The Supreme Courts of South Carolina and of Florida cite many authorities as confirming their thought that, in testing constitutionality, resort may be had to other statutes. We have carefully examined each of these decisions. We do not lengthen this argument by quoting from these decisions, but we assert that in each and every one of them the question involved was merely one of statutory construction and not of constitutionality.

Opposed to this, we find an indication of an opinion to the contrary in the opinion of this Court in *Heisler v. Colliery Company*, 260 U. S. 259, wherein a tax on anthracite coal was attacked on the ground of its constitutionality as against the Commerce Clause of the Federal Constitution. The Attorneys General of nine States joined in the litigation upon the ground that the intention of the Taxing Act as declared by the Governor of the State of Pennsylvania was to levy a tribute upon other states which were dependent upon the State of Pennsylvania for anthracite coal. This Court said:

> "Whether any statute or action of a state infringes upon Interstate Commerce, *depends upon the statute and action, and not what is said about it or the motive which impelled it.*" (Italics added.)

We further cite excerpts from two state decisions, to wit:

Los Angeles v. *Lewis*, 175 Cal. 777-781:

The Court, in considering a question of constitutionality, said:

> "No court in its effort to save a law can properly pervert or destroy its plain meaning * * *. Where the meaning is plain, words cannot be read into it or out of it for that purpose."

Rogers-Ruger Company v. *Murray*, 95 A. S. R. 901-903,

in which the Court was urged in order to save the constitutionality of an act, to place upon it a construction which the Legislature probably meant should be placed upon it. The Court said:

> "This Court can only construe. It cannot legislate. Words should not be read into or read out of a plain statute."

We submit that the foregoing authorities, at least, establish the fact that in considering the constitutionality of an action, that the freedom which exists in construing ambiguous statutes does not exist, and that the tendency of the courts has been what the rule should be, that a statute when tested as to its constitutionality must stand or fall upon its own terms.

The exceeding danger of promulgating the principle that a statute unconstitutional upon its face may be considered as constitutional because it is complemented or bolstered up by another statute, is apparent when the question is asked as to what the situation

would be should the Legislature of the State in question later repeal the supporting statute.

(3) The Supreme Court of South Carolina further stated (R. 31) that the statute (Acts of 1929, p. 107) required the Standard Oil Company to "pay a tax of six cents on all of its product sold in South Carolina or used or consumed in its business," evidently referring to the operation of its delivery trucks. We submitted that this additional reason interpolated into its opinion by the Court is erroneous for the reason that the Act provides for a license tax "graduated in accordance with volume of sales." The Court's construction of the Act of 1929 is not, we submit, binding on this Court as that Act was not directly before the Court. Hence, we submit, we have another class of gasoline which is not by statute taxed in South Carolina.

For all of these reasons we submit that the Acts of 1925 and 1929 may not be said to complement and bolster up the Act of 1930, which we submit in itself is clearly unconstitutional.

Respectfully submitted,

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DEC

Supreme Court of the United States

OCTOBER TERM, 1931

No. 170

GREGG DYEING COMPANY, Appellant,

against

W. G. QUERY, J. P. DERHAM, and FRANK C. ROBINSON, Personally and as Members of the South Carolina Tax Commission, Appellees.

No. 245

THE CITY OF GREENVILLE ET AL., Appellants,

against

W. G. QUERY, J. P. DERHAM, and F. C. ROBINSON, Personally and as Members of the South Carolina Tax Commission, Appellees.

APPELLEES' ARGUMENT

JOHN M. DANIEL,
Attorney General for South Carolina.

J. FRASER LYON,
Solicitor for Appellees.

THE R. L. BRYAN CO., COLUMBIA, S. C.
11-30-31-30

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At present and for several years past persons and corporations dealing in gasoline intrastate in South Carolina have, under the several Acts of the General Assembly, been required to pay a tax for the privilege of engaging in such business. The amount of the tax is determined by applying the rate per gallon to the number of gallons sold, plus the number of gallons used by the dealer, or seller. The result of this tax upon the seller is necessarily the enhancement of the price thereof to the consumer by the amount of the tax, and this applies to the seller when he uses his own gasoline and to the consumer indirectly on that which he buys.

It was found that many large users of gasoline in South Carolina in order to avoid the enhancement of the price of gasoline when bought from a South Carolina refiner or other dealer, bought gasoline outside of the State and brought it into the State and stored it for future use. It was only in this way that one could obtain and consume gasoline in South Carolina without bearing the indirect tax burden.

In 1930 the General Assembly passed the Act complained of in this case, whereby it imposed a tax on gasoline brought into this State, not for the purpose of sale, but for storage for future use in the State. The Act especially provides that if a tax has been paid by a dealer under the Act of 1925 and Act of 1929, then no further tax will be required for storage thereof for future use.

The tax under the Act of 1929 is at the rate of 6c per gallon upon all gasoline sold and upon all used by the seller. The tax under the 1930 Act is at the rate of 6c per gallon upon all purchased outside of the State and stored for future use within the State. Such thereof as is not stored for future use in South Carolina is not taxed.

It is true that Standard Oil Company refines and stores gasoline in Charleston, South Carolina, and it pays no tax on account of the storage thereof. However, it pays the tax on all sold within the State, except as hereinbelow explained, and

upon all used in the State; that kept in storage for sale and shipment outside of the State is not taxed.

When Standard Oil Company, or other dealers in gasoline in South Carolina, sell a tank car of gasoline to another South Carolina dealer, the Oil Company, or first seller, is not required to pay the tax on that, but the South Carolina dealer who buys it and who resells it is required to pay the tax when and as the gasoline is used and sold by such dealer. Were it not for this arrangement, no dealer in South Carolina would buy from another dealer or refiner in South Carolina as the tax would otherwise be required to be paid in advance on the first sale, and the second seller would not have the advantage of paying the tax after the gasoline is sold or used by him.

The result necessarily would be that independent dealers buying in tank car lots would not buy from Standard Oil Company in South Carolina, nor from any other oil company having storage and distributing capacity in the State, but would buy outside of the State and secure the advantage of paying the tax after the sale or use of the gasoline.

If the Act complained of (1930) is sustained, all gasoline consumed in South Carolina will either directly or indirectly bear a tax of 6c per gallon, and such gasoline manufactured within the State and such as is brought in from without the State, will bear the same tax and be on an exact parity.

If the Act of 1930 is declared void, the result will be that many large users of gasoline in the State will not patronize the Standard Oil Refinery in Charleston, nor any other oil company having large or small distributing plants in the State, but will, as plaintiffs do, buy outside the State and store within the State for future use and avoid payment of the tax indirectly as to it.

If the Act complained of should have been written so as to provide that all persons and corporations storing gasoline for future use within the State, which gasoline had not theretofore borne the 6c per gallon tax, should for the privilege of storing for future use and consumption such gasoline, pay an excise of 6c per gallon, such would mean no more and no less

than the Act of 1930 as it is actually written; for that oil companies and dealers whether the gasoline they deal in is refined in South Carolina, or brought into the State from another state, pay the tax of 6c per gallon on all they sell and upon all they use within the State, and that stored for future use would bear the 6c per gallon tax, provided a tax of 6c per gallon had not been paid by a seller before the storage for future use.

Plaintiffs cannot buy gasoline within the State without bearing indirectly the tax of 6c per gallon, and when the Act of 1930 specifically imposes a tax on gasoline brought in from another state, it does so because such gasoline so brought into the State did not under the Acts of 1925 and 1929 bear the 6c per gallon tax and was not on a parity, so far as the tax was concerned, with all other gasoline sold and used within the State. In other words, the Legislature found the only way one had of ultimately avoiding the burden of tax under the Acts of 1925 and 1929 was to buy gasoline in another state, bring it into South Carolina and store it for future use, and it directed the complementary legislation to the exact gasoline which was being used and consumed in the State and which bore no tax burden.

It is true that Standard Oil Company in Charleston, and all other companies, may store gasoline without paying a tax on the storage for future use, and they all may sell and deliver gasoline to out of the State consumers without paying the tax thereon, but they are required to and do pay the tax on all they sell and all they use in the State. Plaintiffs, under the Act of 1930, are required to pay the tax on all it stores for future use within the State, but, like Standard Oil Company and others, they may store any quantity in the State without being required to pay the tax, provided it is intended to be ultimately used without the State. They have, so far as the tax is concerned, every right and privilege enjoyed by Standard Oil Refinery, as well as all others storing gasoline within the State, which may be brought from without the State. The

tax on the storage for future use in South Carolina is the same as the tax on sales and use in South Carolina.

The relevant sections of the Act of 1930 are as follows:

"Section 1. *Be it enacted* by the General Assembly of the State of South Carolina: Every person, firm, corporation, municipality, County, or any subdivision thereof, in the State of South Carolina which shall import into this State from any other State or foreign Country, or shall receive by any means into this State, and keep in storage in this State for a period of twenty-four hours or more, after the same shall have lost its interstate character as a shipment in interstate commerce, any gasoline or any other like products of petroleum or under whatever name designated, which is intended to be stored or used for consumption in this State, shall pay a license tax of six cents per gallon for every gallon of gasoline, or other like products of petroleum aforementioned, which shall have been shipped or imported into this State from any other State or foreign country, and which shall hereafter, for a period of twenty-four hours after it loses its interstate character as a shipment of interstate commerce be kept in storage in this State to be used and consumed in this State by any person, firm, or corporation, municipality, county or subdivision thereof, and which has not already been subjected to the payment of the license taxes imposed upon the sale thereof by Acts of the General Assembly of the State of South Carolina, the same being Act, No. 34, Acts of 1925, approved the 23rd day of March, 1925, and Act No. 102, Acts of 1929, approved the 16th day of March, 1929, imposing license taxes for the privilege of dealing in gasoline or other like products of petroleum; *Provided*, That this Act shall not impose a tax upon crude petroleum, residium or smudge oil, *Provided, further*, That one percent to cover the loss by evaporation, spillage or otherwise shall be deducted by the taxpayer when remitting the tax required by this Act."

"Section 6. Nothing within this Act shall be con-

strued to impose a license tax upon any selling agent, consumer, or retailer, selling, consigning, shipping, distributing or using gasoline, combinations thereof, or substitutes therefor, which may have been bought from any oil company on which the license taxes imposed by Act. No. 34, Acts of the General Assembly of 1925, approved the 23rd of March, 1925, and Act No. 102, Acts of the General Assembly of 1929, approved the 16th day of March, 1929, have been paid nor shall this Act be construed as applying in the case of interstate commerce."

That the Legislature had a purpose to round out and complete legislation to tax all gasoline consumed in the State is evidenced by the fact that the above-quoted sections of the Act of 1930 provide that if the tax has been paid under the Acts of 1925 and 1929, no further tax shall be required under the Act of 1930.

When the question as in this case is whether the state taxing law contravenes rights secured under the Federal Constitution, the decision does not depend upon mere question of form, construction or definition, but upon the practical operation and effect of the tax imposed.

Regardless of the phraseology contained in the Act of 1930, its practical operation and effect is to put gasoline brought in from another state and stored for future use within this State on an exact parity and equality with all other gasoline used within the State and sold within the State.

If there be any discrimination, it is in favor of the gasoline described in the Act of 1930, for as much of that gasoline as may be used after it is delivered to the consignee and within twenty-four hours thereafter may not be taxed at all. Gasoline sold within the State and that used by the seller enjoys no such privilege. When gasoline is received from another state by a dealer in South Carolina and the dealer immediately sells or uses the same within the State, the tax must be paid. When Standard Oil Company refines gasoline in Charleston and immediately sells the same or uses the same within the State, the tax must be paid.

Neither of the above are allowed to use or sell gasoline for a period of twenty-four hours after it has lost ' s immunity as interstate commerce without paying the tax.

> "This argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the federal Constitution. For, where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed."
>
> *Shaffer v. Carter,* 252 U. S., 37, 40 Sup. Ct. Rep., 221–226.

> "And further, in determining whether a tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause, our decision must regard the substance of the exaction,—its operation and effect as enforced,—and cannot depend upon the manner in which the taxing scheme has been characterized."
>
> *Kansas City F. S. & M. Ry. Co. v. Botkin,* 240 U. S., 227, 36 Sup. Ct. Rep., 261.

The construction of a state statute by the State Supreme Court will be accepted by the Supreme Court of the United States, and such construction treated as a part of the statute itself.

The Supreme Court of South Carolina has construed the Act of 1930, together with the Acts of 1925 and 1929, has ruled that they must all be read together as one Act and that under these several statutes the gasoline defined in the Act of 1930 bears no greater tax burden than other gasoline used and consumed in the State.

Referring to the Act of 1930, the State Court held:

> (T-30) "The Act of 1930 puts gasoline imported in interstate commerce and thereafter stored to be used and consumed in South Carolina on the same basis, as to

taxation, as domestic gasoline, that is, gasoline produced in this state and used and consumed in this state.

. . . . . .

"The tax applies only to persons who store with intent to use and consume the gasoline in South Carolina. The class sought to be reached by the tax is clear. The tax is single upon the use and consumption in South Carolina of gasoline, whether imported or not. Mere storage after manufacture or production is not enough to provoke the application of the tax. The only kind of storage affected is that with intent to use and consume the product in South Carolina. Such intention on its part petitioner admits to exist in the instant case, and in all future transactions. The fact that the Standard Oil Company at Charleston, S. C., manufactures and produces large quantities of gasoline which is stored at its refinery and which is untaxed before its sale or use in South Carolina, does not, to our mind, work a discrimination against petitioner or producers in other states. It is admitted that that Company, like all others, is required to pay and does pay a tax of six cents on all of its product sold in South Carolina or used and consumed in its business. The equality and uniformity of the tax is apparent.

"That a tax-free period of twenty-four hours on all gasoline brought into the State by petitioner and others in like plight is allowed by the Act, cannot, we think, be a ground of complaint on the part of petitioner.

"Taking then, these Gasolin Tax Acts as a whole and construing them as one enactment as we must in order to ascertain the intention of the Legislature and to give full force and effect to the expressed public policy of the State to lay a gallonage tax on all gasoline sold, used and consumed in South Carolina, regardless of origin, it is our opinion that these objections to the Act of 1930 under the Federal Constitution cannot be sustained."

And so the State Supreme Court has contrued the Statutes of South Carolina as placing upon appellant's gasoline no

greater tax than is placed upon other gasoline similarly circumstanced in South Carolina.

> "The construction given a state statute by the highest judicial tribunal of the state is regarded as a part of the statute and is as binding upon the Courts of the United State as the text."
>
> *Zeiger v. Penn. R. Co.*, 151 Fed., 348.
> Judgment in the above affirmed: 158 Fed., 809.
> Certiorari denied: 212 U. S., 575, 29 Sup. Ct. Rep., 684.
> *Jos. Dixon Crucible Co. v. Paul*, 167 Fed., 784.
> *City of Winchester et al. v. Winchester Waterworks Co.*, 251 U. S., 192, 40 Sup. Ct. Rep., 123.
> *Palmer v. Ohio*, 248 U. S., 32, 39 Sup. Ct. Rep., 16.
> *Latourette v. McMaster*, 248 U. S., 465, 39 Sup. Ct. Rep., 160.
> *People v. McCall*, 245 U. S., 345, 38 Sup. Ct. Rep., 123.

The Acts of 1925, 1929 and 1930 should be construed pari materia:

This is especially true because the Act of 1930, aside from legislating on the same subject, specifically refers to the Acts of 1925 and 1929, and by its terms these other Acts must be taken into consideration for the purpose of construction and enforcement of the Act of 1930.

In addition to the authorities cited by the Supreme Court of South Carolina on the above subject, we cite the following:

> *U. S. v. Saunders*, 22 Wall., 492.
> *U. S. v. Farden*, 99 U. S., 10.
> *Veterbo v. Friedlander*, 120 U. S., 707.
> *U. S. v. Freeman*, 3 How., 556.
> *U. S. v. Babbit*, 1 Black, 55.
> *St. Louis I. M. & S. R. Co. v. U. S.*, 251 U. S., 198.

Assignment of Errors Nos. 4 and 5 are to the effect that the South Carolina Court erred in not holding this to be a license tax and that a license tax cannot be laid in part upon interstate commerce.

We deem it sufficient answer to the above to call the Court's attention to that part of the Act of 1930 which, as to the gasoline referred to, provides:

> ". . . shall pay a license tax of six cents per gallon for every gallon of gasoline, etc., aforementioned, which shall have been shipped or imported into this State from any other state or foreign country, and which shall hereafter, for a period of twenty-four hours after it loses its interstate character as a shipment of interstate commerce, be kept in storage in this State to be used and consumed in this State."

The South Carolina Court held:

> "On its face, the Act expressly negatives an intention to tax interstate commerce. It does not purpose to tax any gasoline until twenty-four hours after it has lost its interstate character. It seeks to operate only after the commodity has been severed from its interstate character and has become at rest as a part of the general mass of property in this State subject to the protection of its laws. Its immunity from State taxation is then at an end."

Assignment of Error No. 6 is to the effect that the Act violates the Commerce Clause and equal protection Clause of the Fourteenth Amendment to the Federal Constitution, in that it discriminates against gasoline produced by other states; places the tax only upon those who import gasoline in interstate commerce and store it for twenty-four hours for future use; that it appears that gasoline is manufactured within the State, and that such gasoline stored for future use and consumption in the State is exempt from the tax imposed under the Act of 1930.

It is true that gasoline manufactured within South Carolina and stored for future use and consumption is exempt from the tax, but all such gasoline, whether stored for future use or

not, is subject to a tax of six cents per gallon when it is used in the State and when it is sold in the State. See Stipulation T-50.

The South Carolina Supreme Court held:

> "The fact that the Standard Oil Company at Charleston, S. C., manufactures and produces large quantities of gasoline which is stored at its refinery and which is untaxed before its sale or use in South Carolina, does not, to our mind, work a discrimination against petitioner or producers in other states. It is admitted that that Company, like all others, is required to pay and does pay a tax of six cents on all of its product sold in South Carolina or used and consumed in its business. The equality and uniformity of the tax is apparent."

As to the interstate character:

We have already presented our views on the question as to the tax being a burden on interstate commerce and will not repeat here what we have heretofore said upon that subject.

As to assignment of Error No. 10:

It is claimed under this assignment that the South Carolina Court erred in construing the Act of 1925 and the Act of 1929 as placing a tax upon gasoline merely used within the State of South Carolina and that Standard Oil Company is legally forced and required to pay the tax upon gasoline used by it in its fleet of trucks in the State, and that the tax of six cents per gallon is by statute passed on to all users of gasoline.

As hereinbefore pointed out, we think this Court is bound by the construction of the Statutes of South Carolina made by the Supreme Court of that State. Besides, it is stipulated that gasoline sold and used by the seller in this State is taxed (T-50), and as held by the State Court the effect of a tax such as this, indirect, is that the ultimate consumer pays it.

As to assignment of Error No. 11:

Assignment of Error No. 11 is to the effect that the Court erred in holding that the Acts of the State, taken as a whole, reach and tax all gasoline consumed in the State, while the

Act of 1930 expressly leaves free of taxation gasoline used within twenty-four hours after its importation, and that the Acts of 1925 and 1929 do not legally impose a tax on gasoline produced and used, but not sold in South Carolina.

In answer to the above, the South Carolina Court held:

> "It is admitted that that Company, like all others, is required to pay, and does pay, a tax of six cents on all of its product sold in South Carolina or used and consumed in its business."

See also stipulation of Counsel, page 50.

And so it is construed by the State Court of last resort that if there is any discrimination, it is in favor of plaintff and all of those similarly situated, for they may purchase gasoline in another state, bring it into this State, store and use any part of it within twenty-four hours and not be required to pay a tax, as the Court held:

> "that a tax free period of twenty-four hours on all gasoline brought into the State by petitioner and others in like plight as allowed by the Act, cannot, we think, be a ground of complaint on the part of petitioner" (T-31).

As to assignment of Errors Nos. 12 and 13:

Assignment of Errors Nos. 12 and 13 are to the effect that the Act in question violates certain provisions of the State Constitution.

The Court of last resort of the State having passed upon these matters, we do not think they are open for question here.

We think that the tax in question in this litigation is according to the decisions of this Court and of the South Carolina Court, purely an excise, and that the State has power to impose it:

Texas v. Brown, 258 U. S., 466-481, 42 Sup. Ct. Rep., 375; 66 Law Ed., 721-728.

Bromley v. McCaughn, 280 U. S., 124, 50 Sup. Ct. Rep., 46; 74 Law Ed., 226.

Hart Refineries v. Harmon, 278 U. S., 499, 49 Sup. Ct. Rep., 188.

It appears under the facts in this case that the tax is not upon interstate commerce, as the Act specifically provides that the tax shall only attach twenty-four hours after the gasoline has lost its character of interstate commerce. The complaint alleges, Paragraph 6, that the gasoline was unloaded by the plaintiff and stored in its tanks at its plant in Aiken County, South Carolina, for a period of more than twenty-four hours, and it is stipulated (T-16), that gasoline is unloaded by plaintiff at Graniteville, S. C., and was there stored for more than twenty-four hours.

The tax does not discriminate against products of a sister state, because the tax required to be paid by plaintiff for the storage, consumption and use of the gasoline described in the complaint at the rate of six cents per gallon is the same amount of tax required to be paid upon all gasoline sold, and upon all gasoline used by the seller in South Carolina and the tax paid upon the use by the seller is direct, and that paid by other consumers is indirect.

All of which is respectfully submitted for the consideration of this Honorable Court.

JOHN M. DANIEL,
Attorney General for South Carolina.

J. FRASER LYON,
Solicitors for Appellees.

SUPREME COURT OF THE UNITED STATES.

Nos. 170 and 245.—October Term, 1931.

Gregg Dyeing Company, Appellant, 170 *vs.* W. G. Query, J. P. Derham, and F. C. Robinson, Personally and as Members of South Carolina Tax Commission.	Appeal from the Supreme Court of the State of South Carolina.
The City of Greenville, etc., et al., Appellants, 245 *vs.* W. G. Query, J. P. Derham, and Frank C. Robinson, constituting the State Tax Commission of the State of South Carolina.	Appeal from the Supreme Court of the State of South Carolina.

[May 31, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

By these actions, within the original jurisdiction of the Supreme Court of South Carolina, appellants sought to restrain the enforcement of the state statute known as the "Gasoline Tax Act of 1930" (Acts So. Car., 1930, p. 1390). The statute was assailed upon State and Federal grounds, the latter being that the act violated the commerce clause (Art. I, sec. 8, par. 3), and the equal protection clause of the Fourteenth Amendment, of the Federal Constitution. The state court overruled these contentions and dismissed the complaints. The cases are brought here by appeal.

The provisions of the statute which give rise to the Federal questions are found in sections one and six as follows:

"Section 1. . . . Every person, firm, corporation, municipality, . . . in the State of South Carolina which shall import into this State from any other State or foreign Country, or shall receive by any means into this State, and keep in storage in this State for a period of twenty-four hours or more, after the same

shall have lost its interstate character as a shipment in interstate commerce, any gasoline or any other like products of petroleum or under whatever name designated, which is intended to be stored or used for consumption in this State, shall pay a license tax of six cents per gallon for every gallon of gasoline, or other like products of petroleum aforementioned, which shall have been shipped or imported into this State from any other State or foreign country, and which shall hereafter, for a period of twenty-four hours after it loses its interstate character as a shipment of interstate commerce be kept in storage in this State to be used and consumed in this State by any person, firm, or corporation, municipality, . . . and which has not already been subjected to the payment of the license taxes imposed upon the sale thereof by acts of the General Assembly of the State of South Carolina, the same being Act, No. 34, Acts of 1925, approved the 23rd day of March, 1925, and Act No. 102, Acts of 1929, approved the 16th day of March, 1929, imposing license taxes for the privilege of dealing in gasoline or other like products or petroleum; Provided, That this Act shall not impose a tax upon crude petroleum, residium or smudge oil, Provided, further, That one percent to cover loss by evaporation, spillage or otherwise shall be deducted by the taxpayer when remitting the tax required by this Act. . . .

"Section 6. Nothing within this Act shall be construed to impose a license tax upon any selling agent, consumer, or retailer, selling, consigning, shipping, distributing or using gasoline, combinations, thereof, or substitutes therefor, which may have been bought from any oil company on which the license taxes imposed by Act No. 34, Acts of the General Assembly of 1925, approved the 23rd of March, 1925, and Act No. 102, Acts of the General Assembly of 1929, approved the 16th day of March, 1929, have been paid nor shall this Act be construed as applying in the case of interstate commerce".

In the case of *Gregg Dyeing Company* (No. 170), the facts alleged in the complaint were admitted by demurrer and other facts were stipulated as if the complaint had set them forth. It thus appeared that plaintiff conducted a bleachery in Aiken, South Carolina, and used gasoline in its processes; that its practice is to buy gasoline in bulk from dealers outside the State of South Carolina and to have the gasoline shipped in interstate commerce to plaintiff's plant where the gasoline is unloaded and stored, and kept in storage, in plaintiff's tanks, for more than twenty-four hours and until it is needed for use, and in its entirety is used by plaintiff in its manufacturing business and for its own purposes, and is not brought into the State for resale and is not resold; that

there is in Charleston, South Carolina, a refinery maintained by the Standard Oil Company at which large quantities of gasoline are produced; that much of the gasoline thus produced, and much that is brought into the State by oil companies for resale, is stored within the State for more than twenty-four hours before it is sold or used, and is not taxed for its importation and/or storage in South Carolina, but is taxed when it is used or sold in that State by such oil companies; and that such gasoline, produced in the refinery above-mentioned, as is shipped to other States is not taxed in South Carolina. Final judgment was rendered in favor of defendants upon the demurrer.

In the case brought by the *City of Greenville* (No. 245), plaintiff alleged that it was a municipal corporation which had brought into the State of South Carolina gasoline in tank car lots, purchased outside the State, and thereafter had stored, and used and consumed it for public purposes. Defendants demurred, there was an agreed statement of facts in addition to the allegations of the complaint, and the judgment upon the demurrer thus raised the same Federal questions as those presented in the case first mentioned.

In maintaining rights asserted under the Federal Constitution, the decision of this Court is not dependent upon the form of a taxing scheme, or upon the characterization of it by the state court. We regard the substance rather than the form, and the controlling test is found in the operation and effect of the statute as applied and enforced by the State. *St. Louis Southwestern Railway Co.* v. *Arkansas,* 235 U. S. 350, 362; *Hanover Fire Insurance Co.* v. *Harding,* 272 U. S. 494, 509, 510. The operation and effect of this tax act has been determined definitely by the state court in the instant cases. Construing the act, that court has said:

"The Act in question may be said to be complementary to the other statutes of South Carolina under which are assessed a gallonage tax on gasoline and other petroleum products. Indeed, it expressly excludes from its provisions all gasoline upon which a like tax has been paid under other statutes. It so declares in its title and specifically designates in its body the statutes, payment of the tax under which exempts from its burden. . . .

"In South Carolina, commencing about a decade ago, the General Assembly expressed its public policy as to revenue to be derived from the use of gasoline, vol. 32, Stat. at Large, p. 835. The tax then imposed was two cents a gallon. In 1925, the tax was

increased to five cents, and in 1929, to six cents on the gallon. These statutes, however, only reached 'dealers' in this commodity. . . .

"Statutes of this nature have been uniformly construed as imposing a tax on the ultimate consumer or user, as will be hereafter shown. Realizing that large users of gasoline either were evading or would evade the payment of the tax imposed under these Acts, by bringing in gasoline in quantities from without the State, and storing it for their own purposes, the Legislature in 1930 enacted the statute under consideration, applying the six cents tax to every person, firm, corporation, municipality or any subdivision subject to its terms. . . . Thus, with the Act of 1930 complementing the other statutes referred to, all consumers of gasoline in South Carolina pay a tax of 6 cents per gallon, no matter what the origin of, or State in which, the gasoline is produced. . . .

"On its face, the Act expressly negatives an intention to tax interstate commerce. It does not purpose to tax any gasoline until twenty-four hours after it has lost its interstate character. It seeks to operate only after the commodity has been severed from its interstate character and has become at rest as a part of the general mass of property in this State subject to the protection of its laws. . . .

"The tax here imposed is an excise tax and not a property tax. . . . All oil companies in South Carolina, including the Standard Oil Company in Charleston, S. C. are required to pay and do pay the tax upon any gasoline they sell and all that they use in South Carolina, whether it be for operating their trucks upon the highways or otherwise (34 Stat. at Large, p. 197). . . .

"The tax applies only to persons who store with intent to use and consume the gasoline in South Carolina. . . . Mere storage after manufacture or production is not enough to provoke the application of the tax. The only kind of storage affected is that with intent to use and consume the product in South Carolina. Such intention on its part petitioner admits to exist in the instant case, and in all future transactions. The fact that the Standard Oil Company at Charleston, S. C. manufactures and produces large quantities of gasoline which is stored at its refinery and which is untaxed before its sale or use in South Carolina, does not, to our mind, work a discrimination against petitioner or producers in other States. It is admitted that that company, like all others, is required to pay and does pay a tax of six cents on all of its products sold in South Carolina or used and consumed in its business".

We may lay aside, as not here involved, any question relating to importations from foreign countries. As to interstate commerce, the questions are (1) whether the Act as applied by the

state court imposes a direct burden upon that commerce, and (2) whether, although the subject of the tax would otherwise be within the power of the State, the tax is invalid because it creates an unconstitutional discrimination against transactions in interstate commerce.

As to the first question, we are not concerned with what the tax is called but with what the statute does. It imposes an exaction with respect to gasoline purchased in other States and brought into South Carolina and there placed by appellants in storage for future use within the State. By the terms of the Act, as construed by the state court and applied to these appellants, interstate commerce in relation to the subject of the tax has ended. The gasoline has come to rest within the State, having been placed in appellants' storage tanks and added to appellants' property kept for local purposes. In such circumstances the State has the authority "to tax the products or their storage or sale". *Texas Company* v. *Brown*, 258 U. S. 466, 478; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, 519, 520; *Hart Refineries* v. *Harmon*, 278 U. S. 499, 501, 502. Not only may local sales of gasoline thus brought into the State be taxed, but its use as well. This was specifically determined in *Bowman* v. *Continental Oil Company*, 256 U. S. 642, 648, 649. See *Hart Refineries* v. *Harmon, supra; Breece Lumber Co.* v. *Asplund*, 283 U. S. 788. There is an exception in the case of a tax directly on use in interstate commerce, as on use in interstate transportation. *Helson* v. *Kentucky*, 279 U. S. 245, 252; *Eastern Air Transport* v. *South Carolina Tax Commission*, decided March 14, 1932. In view of these well-established principles, we find no ground for concluding that the State could not impose the tax with respect to the gasoline of appellants which was kept within the State for use in their local enterprises. As the Court said, in *Hart Refineries* v. *Harmon, supra*, interstate transportation having ended, the taxing power of the State in respect of the commodity may, so far as the commerce clause of the Federal Constitution is concerned, "be exerted in any way which the State's constitution and laws permit". This, of course, is on the assumption that the tax does not discriminate against the commodity because of its origin in another State.

The state court answered the contention as to discrimination against interstate commerce by referring to other statutes of the

State imposing a tax upon the sale and use of gasoline within the State. The state court said that the Act in question "taxes all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes. By the kindred Acts all users are taxed". But appellants question the right to invoke other statutes to support the validity of the Act assailed. To stand the test of constitutionality, they say, the Act must be constitutional "within its four corners", that is, considered by itself. This argument is without merit. The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power. When the Supreme Court of the State has held that two or more statutes must be taken together, we accept that conclusion as if written into the statutes themselves. *Hebert* v. *Louisiana*, 272 U. S. 312, 317. See *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 73.

Reading together the statutes with respect to gasoline taxes, the state court took the view that as to the gasoline tax with respect to sales within the State, the burden actually rests upon the consumer, although not placed upon the consumer directly. No reason is found to challenge this view. *Texas Company* v. *Brown, supra,* at p. 479; *Panhandle Oil Company* v. *Knox*, 277 U. S. 218, 222; *Indian Motocycle Company* v. *United States*, 283 U. S. 578, 579. So far as dealers in gasoline within the State are concerned, there appears to be no ground for appellants' claim of discrimination. The point with respect to appellants is that they are not dealers but users, consumers of gasoline in their business. They are required to pay the tax with respect to the gasoline they keep for such use and consumption within the State. As to such gasoline, they pay precisely the same amount per gallon as other consumers within the State are in effect required to pay through the tax on the dealers from whom such consumers buy. Discrimination is asserted in relation to manufacturers who produce gasoline within the State and consume it in their enter-

prises. Appellants have directed particular attention to the case of a refining company which produces gasoline in South Carolina and consumes gasoline in its business and also sells it within the State. The state court, construing the applicable statute, has held that in such a case the producing company is taxed with respect to the gasoline it uses as well as with respect to the gasoline it sells. The decision is unequivocal that "all oil companies in South Carolina are required to pay and do pay the tax upon any gasoline they sell and all that they use in South Carolina". With respect, then, to the gasoline used by appellants in their business, there is in this aspect no discrimination against them because their gasoline has its origin in another State, as others either buying or producing gasoline within the State pay the tax at the same rate in relation to their consumption.

Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries. *Shaffer* v. *Carter*, 252 U. S. 37, 55. Appellants' attack upon the tax comes to this, in the last analysis, that the tax in their case is laid with respect to the gasoline they have bought outside the State and keep in storage for use and consumption in their business, whereas others are taxed, not with respect to the gasoline they keep in store for use and consumption, but for the gasoline they use and consume. But appellants have admitted, as the state court has said, that "the only kind of storage affected" is that for the purpose of use and consumption. In this view the state court found no distinction of substance with respect to the practical operation of the taxing statutes in *pari materia,* as all in like case, appellants and others who use gasoline in their business enterprises, pay the same amount on the gasoline they consume. Appellants had the burden of showing an injurious discrimination against them because they bought their gasoline outside the State. This burden they have not sustained. They have failed to show that whatever distinction there existed in form, there was any substantial discrimination in fact.

The same considerations, with respect to discrimination, apply to the claim that the statute in question violates the equal protection clause of the Fourteenth Amendment. The statement of this Court in *German American Tank Car Corporation* v. *Day*, 270 U. S.

367, 373, is apposite: "In determining whether there is a denial of equal protection of the laws by such taxation, we must look to the fairness and reasonableness of its purposes and practical operation, rather than to minute differences between its application in practice and the application of the taxing statute or statutes to which it is complementary".

The right of the City of Greenville (No. 245) to raise the questions presented under the Federal Constitution does not appear to have been challenged or passed upon by the state court and has not been discussed at this bar. Accordingly, that question has not been considered here.

Judgments affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.